Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON; CITY OF AUBURN, WASHINGTON; AND CITY OF DES MOINES, WASHINGTON,
PETITIONERS,

v.

QWEST CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Added to the Communications Act by the Telecommunications Act of 1996, 47 U.S.C. §253 preempts state and local laws and requirements that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications service (§253(a)), but preserves the authority of state and local governments to "manage the public rights-of-way" or to require "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way" (§253(c)). The questions presented are:

1. Whether the court of appeals was correct in holding that whether or not a municipal ordinance "ha[s] the effect of prohibiting the ability of" a complaining carrier to provide telecommunications service within the meaning of 47 U.S.C. §253(a) must be decided purely as a question of law, without considering whether, as a factual matter, the municipal ordinance it challenges actually has the effect of prohibiting it from providing service.

2. Whether the court of appeals, which had reversed the district court's dismissal of a § 253 counterclaim on ripeness grounds, properly proceeded to resolve the merits of that counterclaim on the pleadings by drawing factual inferences against the non-moving party.

3. Whether the reservation of local authority to charge "fair and reasonable compensation" for public right-of-way use in 47 U.S.C. § 253(c) includes authority to charge rent-based municipal fees for use of public rights-of-way or is instead intended to restrict municipal fees to an amount that is based on a municipality's costs of maintaining its public rights-of-way.

PARTIES TO THE PROCEEDING

In addition to Petitioners, the City of Tacoma, the City of Auburn, and the City of Des Moines, Washington, and the Respondent, Qwest Corporation, the parties to the proceeding in the court of appeals were the City of Bremerton, the City of Federal Way, the City of Fife, the City of Lakewood, the City of Medina, the City of Olympia, the City of Puyallup, the City of Renton, the City of SeaTac, the City of Tukwila, the City of University Place, and the City of Vancouver. All of these cities, like Petitioners, are in the State of Washington.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES, RULES AND ORDINANCES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 12

I. THE COURT OF APPEALS' INTERPRETATION OF WHETHER STATE OR LOCAL REQUIREMENTS "HAVE THE EFFECT OF PROHIBITING SERVICE" UNDER SECTION 253(a) IS AT ODDS WITH THIS COURT'S CONSTRUCTION OF LANGUAGE IN A DIRECTLY ANALOGOUS PROVISION OF THE 1996 ACT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS 13

II. THE COURT OF APPEALS' RESOLUTION OF THE MERITS OF A SECTION 253 CLAIM IN CLAIMANT'S FAVOR ON THE PLEADINGS IS CONTRARY TO THE DECISIONS OF THIS COURT CONCERNING AI-PROPRIATE STANDARDS FOR REVIEW. 21

TABLE OF CONTENTS
(continued)

Page

III. THE COURT OF APPEALS' RULING THAT "FAIR AND REASONABLE COMPENSATION" FOR USE OF RIGHTS-OF-WAY UNDER §253(c) IS LIMITED TO RECOVERING THE COST OF MAINTAINING THE RIGHT-OF-WAY CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT AND PRESENTS AN IMPORTANT AND RECURRING ISSUE ON WHICH COURTS ARE DIVIDED 25

CONCLUSION 30

APPENDIX A 1a
Order and Amended Opinion of the
9th Circuit Court of Appeals
Nos. 99-36173, 99-36219,
Filed April 24, 2001
Amended July 10, 2001

APPENDIX B 37a
Order of the U.S. Dist. Court, W.D.
Washington, at Tacoma
No.C98-5595FDB
November 15, 1999
Filed November 16, 1999

APPENDIX C 47a
Federal Rules of Civil Procedure, Rule 12(c)

APPENDIX D 48a
Title 16, City of Tacoma, Washington
Municipal Code

TABLE OF CONTENTS
(continued)

Page

APPENDIX E..... 157a
Title 20, City of Auburn, Washington
Municipal Code

APPENDIX F..... 248a
Ordinance No. 1200 of the City of
Des Moines, Washington, adopted
October 23, 1997, adopting Title 20
Of the Des Moines Municipal Code

TABLE OF AUTHORITIES

CASES

AT&T Communications v. City of Austin,
975 F. Supp. 928 (W.D. Tex. 1997),
vacated as moot, 235 F. 3d 241 (5th Cir. 2000).....9, 13

AT&T Communications v. City of Dallas,
8 F.Supp. 2d 582 (N.D.Tex 1998), *vacated and remanded as moot*, 243 F.3d 928, *on rehearing*, 249 F.3d 336 (5th Cir. 2001) 13, 18

AT&T Communications v. City of Dallas,
52 F. Supp. 2d 763 (N.D. Tex. 1999),
vacated as moot, 243 F. 3d 928, *on rehearing*,
249 F. 3d 336 (5th Cir. 2001).....9, 12

AT&T v. Iowa Utilities Board, 525 U.S. 366
(1999) 3, 4, 14, 15, 16,17

Bell Atlantic v. Prince George's County,
49 F. Supp. 2d 805 (D. Md. 1999),
vacated and remanded, 212 F. 3d 863
(4th Cir. 2000).....9, 12, 18, 26, 27

BellSouth Telecommunications v. City of Coral Springs,
42 F. Supp. 2d 1304 (S.D. Fla. 1999), *affirmed in part, reversed in part, and remanded sub nom. BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169 (11th Cir. 2001).....9

BellSouth Telecommunications v. City of Orangeburg,
337 S.C. 35, 522 S.E. 2d 804
(S.C. 1999) 12, 26, 27

BellSouth Telecommunications v. Town of Palm Beach, 252 F. 3d 1169 (11th Cir. 2001).....12, 17, 18, 19

Cipollone v. Liggett Group, 505 U.S. 504 (1992) 14

City of Albuquerque v. New Mexico Public Service Commission, 115 N.M. 521, 854 P.2d 348 (N.M. 1993) 28

City of Auburn, et al., v. Qwest Corporation, 247 F.3d 966, *amended and superseded by* 260 F.3d 1160 (9th Cir. 2001).....*passim*

City of Auburn, et al., v. U S West Communications, Inc., 79 F. Supp. 2d 1214 (W.D. Wash. 1999), *affirmed in part, reversed in part, and remanded*, 247 F. 3d 966, *amended and superseded* by 260 F. 3d 1160 (9th Cir. 2001).....1, 6, 7, 12

City of Dallas v. FCC, 118 F. 3d 393 (5th Cir. 1997).....28

City of Richmond v. Chesapeake & Potomac Tel. Co., 205 Va. 919, 140 S.E.2d 683 (Va. 1965).....28

City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1893) 28

English v. General Electric Co., 496 U.S. 72 (1990)..... 14

Erie Telecommunications v. City of Erie, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) 28

FCC v. Iowa Utilities Board, 219 F.3d 744 (8th Cir. 2000), *cert. granted*, 12 S. Ct. 878 (Jan. 22, 2001) (No. 00-587).....4

Gregory v. Ashcroft, 501 U.S. 452 (1991).....3

Group W Cable, Inc. v. City of Santa Cruz, 669 F. Supp. 954 (N.D. Cal. 1987), *further proceedings* 679 F. Supp. 977 (1988).....28

Hormel v. Helvering, 312 U.S. 552 (1941) 24, 25

Lorillard v. Pons, 434 U.S. 575 (1978) 27

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).....14

National Metropolitan Bank v. U.S., 323 U.S. 454 (1945) 22

Omnipoint Communications v. Port Authority of New York and New Jersey, 1999 WL 494120 (S.D.N.Y. 1999) 26, 27

PECO v. Township of Haverford, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999).....26

Pacific Tel. & Tel. Co. v. City of Los Angeles, 44 Cal.2d 272, 282 P.2d 36 (Cal. 1955).....28

Qwest v. City of Berkeley, et al., 146 F.Supp. 2d 1081 (N.D. Cal. 2001).....13, 26

Singleton v. Wulff, 428 U.S. 106 (1976).....8, 23, 24, 25

TCG Detroit v. City of Dearborn, 206 F. 3d 618 (6th Cir. 2000) 9, 12, 19, 20, 25, 26

TCG Detroit v. City of Dearborn, 16 F. Supp. 2d 785 (E.D. Mich. 1998), *aff'd*, 206 F. 3d 618 (6th Cir. 2000) 12, 26, 27

TCG New York, Inc. v. City of White Plains,
125 F. Supp. 2d 81
(S.D. N.Y. 2000) 9, 12, 16, 26, 27

Telesat Cablevision, Inc. v. City of Riviera Beach,
773 F. Supp. 383 (S.D. Fla. 1991) 28

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 28

U.S. West v. Arizona Corp. Commission, 198 Ariz. 208,
8 P. 3d 396 (Ariz. Ct. App. 2000) 12, 17

Verizon Communications, Inc. v. FCC, 219 F.3d 744
(8th Cir. 2000), *cert. granted*, 121 S.Ct. 877
(Jan. 22, 2001) No. 00-511 4

WorldCom, Inc. v. Verizon Communications, Inc.,
219 F.3d 744 (8th Cir. 2000), *cert. granted*,
121 S.Ct. 877 (Jan. 22, 2001) No. 00-555 4

STATUTES

Judiciary and Judicial Procedure, Part IV, Jurisdiction And Venue:

28 U.S.C. § 1254(1) (1994) 2
28 U.S.C. § 1331 (1994) 6
28 U.S.C. § 1332 (1994 & Supp. V 1999) 6
28 U.S.C. § 1343 (1994) 6
28 U.S.C. § 1367 (1994) 6

Communications Act of 1934, 47 U.S.C. 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 3

47 U.S.C. §153(4) (Supp V 1999) 4
47 U.S.C. §251(d)(2)(B) (Supp. V 1999) 15
47 U.S.C. §251(h)(1) (Supp. V 1999) 4
47 U.S.C. §253 (Supp. V 1999) ..... *passim*
47 U.S.C. §542 (1994 & Supp. V 1999) 28

ORDINANCES

Title 20, City of Auburn, Washington, Municipal Code..... 3, 5, 11

Title 20, City of Des Moines, Washington, Municipal Code..... 3, 5, 11

Title 16, City of Tacoma, Washington, Municipal Code..... 3, 5, 11

RULES AND REGULATIONS

Federal Rules of Civil Procedure 12 (c)..... 3, 6, 8, 21, 22

ADMINISTRATIVE AGENCY ORDERS

In re TCI Cablevision, 12 FCC Rcd 21396 (1997) 16

LEGISLATIVE MATERIALS

H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. (1996)..... 3

141 Congressional Record H8460-61 (daily ed. Aug. 4, 1995) 29

TEXTS

Black's Law Dictionary (7th ed. 1999) 27

5A C. Wright & A. Miller, Federal Practice and Procedure (2d ed. 1990).....21

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CITY OF TACOMA, WASHINGTON; CITY OF AUBURN, WASHINGTON; AND CITY OF DES MOINES, WASHINGTON,
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QWEST CORPORATION,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The cities of Tacoma, Auburn, and Des Moines, Washington, hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals, as amended by its order denying rehearing (App. 1a-36a), is reported at 260 F.3d 1160. (The court of appeals' opinion prior to that amendment is reported at 247 F.3d 966.) The opinion of the district court (App. 37a-46a) is reported at 79 F. Supp. 2d 1214.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 2001. After the timely filing of a petition for rehearing, the court of appeals issued an order denying rehearing and amending its opinion on July 10, 2001. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253 (Supp. V 1999), provides in pertinent part:

> (a) IN GENERAL. - No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) STATE REGULATORY AUTHORITY. - Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> (c) STATE and LOCAL GOVERNMENT AUTHORITY. - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory

basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. - If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Fed. R. Civ. P. 12 (c) is set forth at App. 47a. The ordinance of the City of Tacoma at issue is set forth at App. 48a-156a. The ordinance of the City of Auburn at issue is set forth at App. 157a-247a. The ordinance of the City of Des Moines at issue is set forth at App. 248a-344a.

STATEMENT OF THE CASE

As the Court has observed, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), "fundamentally restructure[d] local telephone markets." *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999). A critical provision of the 1996 Act is 47 U.S.C. §253, which represents Congress' effort to balance the 1996 Act's general goal of promoting competition in telecommunications markets, *see* H.R. Confer. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996), with the longstanding principle that the federal government not unduly intrude upon the sphere of functions reserved to state and local governments in our system of federalism, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Section 253 strikes this balance by preempting state and local regulations that "prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services, 47 U.S.C. §253(a), while, at the same time, carving out safe harbors

that are immune from attack under §253(a). One of those safe harbors is §253(c), which provides that "[n]othing in [Section 253] affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way. . . ." Although the Court has had occasion to address other provisions of the 1996 Act,[1] this case presents the Court with the first opportunity to address the vital balance struck by §253.

Factual Background. Respondent Qwest Corporation ("Qwest")[2] is both an "incumbent local exchange carrier," 47 U.S.C. §251(h)(1) ("ILEC"), and a "Bell Operating Company," 47 U.S.C. §153(4) ("BOC"), within the meaning of the 1996 Act. Qwest has provided local exchange telephone service in each of the Petitioner cities for decades, and continues to do so. Qwest, like many telecommunications service providers, other public utilities and cable television system operators, installs and maintains a substantial number of miles of wires, cables and other facilities on, above or below streets and public rights-of-way that are owned or controlled by the Petitioner cities.

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1 *See, e.g., AT&T v. Iowa Utilities Board*, 525 U.S. 366; *Verizon Communications, Inc. v. FCC*, No. 00-511, ___ U.S. ___, 121 S. Ct. 877 (cert. granted Jan. 22, 2001); *WorldCom, Inc. v. Verizon Communications, Inc.*, No. 00-555, ___U.S. ___, 121 S. Ct. 877 (cert. granted Jan. 22, 2001). *FCC v. Iowa Utilities Board*, No. 00-587, ___ U.S. ___, 121 S. Ct. 878 (cert. granted January 22, 2001).

2 US West Communications, Qwest's predecessor in interest, was the original defendant/counterclaim plaintiff in the case, but due to a subsequent corporate merger, Qwest was substituted for US West as a party in the court of appeals. For convenience, we will refer to Qwest throughout the description of proceedings below.

Mindful of the 1996 Act's expressed preference in §253(c) for competitively neutral treatment of all telecommunications service providers, each Petitioner city adopted an ordinance intended to create a uniform method of treating the multiple new telecommunications users of city rights of-way that the 1996 Act was likely to generate. Tacoma Municipal Code, §§16.01.1-16.01.2; Auburn Municipal Code, §20.02.010; Des Moines Municipal Code, Chapter 20.01 (App. 53a-56a, 157a-159a, 248a-253a). The terms and provisions of each of the ordinances vary considerably, but they share the basic purpose of establishing a generally-applicable process for franchising, licensing and supervising the use of city streets and rights-of-way by telecommunications service providers and other users of city streets and rights-of-way. *Id.* Among other things, each ordinance requires those wishing to install facilities on, above or below city streets or rights-of-way to apply for and obtain a franchise or license from the City, to satisfy insurance and bonding requirements, to follow certain procedures when performing work in the public right-of-way, and to compensate the City for use of the public right-of-way. Tacoma Municipal Code, Chapters 16.01-02; Auburn Municipal Code, Chapters 20.02, 20.04, & 20.10; Des Moines Municipal Code, Chapters 20.04, 20.06, 20.08 & 20.09. (App. 53a-107a, 157a-181a, 210a-247a, 274a-295a, 327a-337a).

The District Court Proceedings. This case originally arose out of a dispute between Petitioners (as well as fifteen other Washington cities) and Qwest concerning the cost of relocating Qwest's rights-of-way facilities to accommodate improvements in city streets and right-of-way. Historically, Qwest had borne the cost of relocating its facilities in such circumstances. In 1996, however, Qwest notified cities and counties in Washington that it would no longer bear those costs and that it would not relocate its facilities to accommodate street and right-of-way improvements until

the city or county making those improvements paid Qwest the cost of relocating its facilities.

Petitioners and fifteen other Washington cities filed a complaint against Qwest in Washington state court seeking a declaration that, under Washington state and federal law, Qwest was obligated to pay relocation costs. The case was removed to federal district court. Qwest thereafter filed a counterclaim against Petitioners (as well as two other Washington cities) seeking a declaration that the right-of-way ordinances adopted by each of those cities violated, *inter alia*, 47 U.S.C.§253(a) because, according to Qwest, they "prohibit[ed] or ha[d] the effect of prohibiting" Qwest's ability to provide telecommunications service. The district court's jurisdiction over Qwest's counterclaim was based on 28 U.S.C. §§1331, 1332(a), 1343 and 1367. Petitioners filed a responsive pleading denying the essential factual allegations in Qwest's counterclaim.

The parties filed cross motions for summary judgment on the state law relocation cost claim. Qwest also filed a Fed. R. Civ. P. 12(c) motion for judgment on the pleadings with respect to its §253 counterclaim, and the cities whose ordinances were challenged filed motions for partial summary judgment with respect to Qwest's §253 counterclaim. In support of its Fed. R. Civ. P. 12(c) motion and in opposition to the cities' motion for partial summary judgment, Qwest presented no evidence suggesting that it was unable to comply with the ordinance provisions it challenged, or that if Qwest were to comply, any city would refuse to grant it a franchise or take any other action that would in any way prohibit Qwest's ability to provide service.

The district court granted the cities' motion for summary judgment with respect to the state law relocation cost claim. (App. 39a-44a.) With respect to the §253 claim, the district court denied Qwest's Fed. R. Civ. P. 12(c) motion, as well as the cities' motion for partial summary judgment, as unripe. (App. 44a-45a.) Concluding that

Qwest "ha[d] not demonstrated that any of the Counterclaim Cities have attempted to enforce their ordinances against it or that any city ha[d] instructed [Qwest] that it must remove its equipment [from city right-of-way] for failure to file a franchise application," the district court reasoned that determining "which particular provision of which ordinance offends the [1996 Act]," and "whether [an] entire ordinance needs to be invalidated despite the ordinances' severability clauses" would be better accomplished "following specific attempts by the Counterclaim Cities to enforce their telecommunications ordinances. " (App. 45a.) As a result, the district court never reached, much less resolved, the merits of Qwest's §253 counterclaim.

Court of Appeals Proceedings. Qwest appealed the district court's rulings on both the state law relocation cost claim and its §253 counterclaim, and Petitioners and one other city cross-appealed the district court's denial of their motion for partial summary judgment on Qwest's counterclaim. The court of appeals affirmed the district court's decision in the cities' favor on the state law relocation cost claim but reversed the district court's decision dismissing Qwest's §253 counterclaim as unripe and remanded that claim to the district court with instructions to grant judgment in Qwest's favor. 247 F. 3d 966. Petitioners timely sought rehearing, which the court of appeals denied on July 10, 2001. The court of appeals did, however, simultaneously issue an amended opinion. (App. 1a-36a.)

With respect to Qwest's §253 claim, the subject of this Petition, the court of appeals held that the district court erred in finding the claim not ripe. (App. 15a-20a.) Rather than remanding Qwest's §253 claim to the district court to allow it to address the merits of that claim in the first instance, however, the court of appeals proceeded to resolve the merits of that claim without benefit of any initial district court review or any facts or evidence at all.

Although the court of appeals recognized that it was ordinarily inappropriate for it to resolve an issue not passed upon below (App. 19a (quoting *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976)), it declined to follow that rule here because it felt Qwest's §253 claim presented "pure issues of law" for which "no further factual amplification [was] necessary." (App. 18a-19a (citations omitted).) Notwithstanding §253(a)'s plain language that only those state and local requirements that "prohibit or have the effect of prohibiting the ability" of Qwest to provide service may be preempted, the court of appeals apparently believed any facts about the actual effect of the ordinances on Qwest or its ability to comply with them were irrelevant; according to the court of appeals, the only relevant facts were "the activity conducted by Qwest" (apparently, its provision of telecommunications services over facilities in pubic rights-of-way) and the fact that the ordinances applied to that activity. (App. 19a.)

The court of appeals characterized the question on appeal as "whether, *on the facts alleged*, Qwest is entitled to judgment as a matter of law." (App. 23a (emphasis added.)) Apparently overlooking that Qwest was seeking judgment on the pleadings with respect to its own counterclaim, the court of appeals thus seems to have assumed the truth of the facts alleged in Qwest's §253 counterclaim in holding that Qwest was entitled to judgment on the pleadings under Fed. R. Civ. P. 12 (c).

Turning to §253(a), the court of appeals opined that, based on its reading of four district court decisions, a municipal "regulatory structure that allows a city to bar a telecommunications provider from operating in the city 'prohibit[s] or ha[s] the effect of prohibiting' the company's ability to provide telecommunications services under 47

U.S.C. §253(a)."[3] (App. 25a.) Elsewhere in its opinion, the court of appeals somewhat inconsistently recognized in a footnote (added in the amended opinion) that the Sixth Circuit had held that a municipal regulation that "allows denial of a franchise does not alone constitute a prohibition within the meaning of §253(a)." (App. 27a n. 11 (citing *TCG Detroit v. City of Dearborn*, 206 F. 3d 618, 624 (6th Cir. 2000)).

Ultimately, the court of appeals held that "several features" of the ordinances at issue, "taken together," had "the effect of prohibiting Qwest and other companies from providing telecommunications services" within the meaning of §253(a).[4] (App. 25a-26a) The ordinance requirements that the court of appeals found, "in combination," had this effect were (1) the "lengthy and detailed" nature of the application form that had to be completed to apply for a franchise; (2) that two of Petitioners' ordinances (but not the third) required a public

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[3] Three of the four district court decisions relied on by the court of appeals for this proposition had been vacated. *Bell Atlantic v. Prince George's County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated and remanded*, 212 F. 3d 863 (4th Cir. 2000); *AT&T Communications v. City of Dallas*, 52 F. Supp. 2d 763 (N.D. Tex. 1999), *vacated as moot*, 243 F. 3d 928, *on rehearing*, 249 F. 3d 336 (5th Cir. 2001); *AT&T Communications v. City of Austin*, 975 F. Supp. 928 (W.D. Tex. 1997), *vacated as moot*, 235 F. 3d 241 (5th Cir. 2000). (Cited in App. 24a-25a.) In the fourth, *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 89 (S.D. N.Y. 2000) (cited in App. 25a), the district court's holding with respect to §253(a) was based on facts – specifically, that the city in *White Plains* had for years failed to act on the complaining telecommunications provider's request for a franchise – not even alleged, much less supported here.

[4] As support for this proposition, the court of appeals cited (App. 26a-27a) two of the vacated district court opinions on which it relied earlier in its opinion, *Bell Atlantic*, 49 F. Supp. 2d at 816, and *City of Dallas*, 52 F. Supp. 2d at 770 (*see* note 3 *supra*), as well as another district court decision whose resolution of the §253(a) issue had been reversed by the Eleventh Circuit, *BellSouth Telecommunications v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999), *affirmed in part, reversed in part, and remanded sub nom. BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1192 (11th Cir. 2001).

hearing before a franchise was granted; (3) that the ordinances authorized the city to exercise discretion in deciding whether to grant, deny or revoke a franchise; (4) that transfers of a franchise or of ownership of a franchisee required city approval; (5) that the ordinances allowed the cities to impose certain fees that were not based on the "costs of maintaining the right of way"; and (6) that the ordinances contemplated the imposition of penalties for their violation. (App. 26a.) While there was no evidence in the record remotely suggesting that a multi-billion dollar BOC like Qwest could not comply with each of these requirements, or that Qwest would exit the market rather than doing so, or that, if Qwest were to comply with these requirements, the cities would not grant it a franchise, in the court of appeals' view these requirements nevertheless collectively "creat[ed] a substantial and unlawful barrier to entry into and participation in [Petitioner cities'] telecommunications markets." (App. 26a.)

The court of appeals turned next to §253(c), a "safe harbor provision" that, as the court of appeals recognized, "permits local regulations that 'manage the public rights-of-way ' and 'require fair and reasonable compensation' for the 'use' thereof." (App. 27a.) Having noted that §253(c) protects these two separate and independent local governmental interests, the court of appeals nevertheless ceased further consideration of "fair and reasonable compensation" for right-of-way use and devoted its attention exclusively to "management of the public rights-of-way." (App. 27a-33a.) The court of appeals held that Petitioners' ordinances did not constitute permissible right-of-way management under §253(c) because they "establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way." (App. 29a.) The court of appeals identified "four significant features of the ordinances" that, in its view, were "not directly related to management of the public rights-of-way": (1) "the ordinances require Qwest to undergo an extensive

application process"; (2) "the ordinances impose reporting requirements or other controls," including requiring approval of a transfer ownership of the franchisee; (3) the ordinances require that "franchise agreements contain certain conditions" that the court of appeals found objectionable, including a "most-favored-community" provision and a requirement that franchisees "provide free or excess capacity" for the city's use; and (4) the ordinances gave the cities discretion to grant, deny, or revoke a franchise based on the public interest.[5] (App. 29a-32a)

The court of appeals dismissed Petitioners' argument that the ordinances "regulate aspects of telecommunications companies that are related to their fitness to. . . use the rights-of-way" as a "children's ditty," believing that Petitioners' argument "would have no limiting principle." (App. 33a.) The court of appeals appears to have overlooked that, due to the posture of the case and the court's insistence that the "facts alleged" by Qwest must be assumed true (App. 23a), Petitioners had no opportunity to introduce evidence explaining the justifications for the ordinance requirements at issue.

Although the court of appeals addressed only a few provisions of comprehensive ordinances dealing with many matters that the court of appeals appeared to concede were legitimate forms of right-of-way management,[6] it nevertheless declined to sever the ordinance provisions it

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[5] Although the court of appeals believed these four "aspects of the ordinances. . . most seriously violate §253(c)," it also went out of its way to list several other aspects of the ordinances that it felt were "objectionable." (App. 32a-33a & n. 19.)

[6] *Compare* App. 28a-29a (listing of subjects the court of appeals believed were legitimate forms of right-of-way management) *with, e.g.*, Tacoma Municipal Code, Chapter 16.01; Auburn Municipal Code, Chapters 20.04 & 20.10; Des Moines Municipal Code, Chapters 20.04, 20.06, 20.07 & 20.08 (App. 65a-98a, 170a-181a, 210a-247a, 274a-334a) (ordinance provisions addressing these issues).

found objectionable; instead it preempted the ordinances *in toto*. (App. 34a-25a.) Unlike the district court, which concluded that the validity of the ordinances' provisions under §253 could meaningfully be addressed only on a provision-by-provision basis (App. 45a), the court of appeals spurned any "line-by-line severability analysis" of each city's ordinance as "not practical." (App. 34a-35a.)

REASONS FOR GRANTING THE PETITION

In the more than five years since Congress enacted §253, this key provision of the 1996 Act has spawned widespread litigation and considerable disagreement among the courts about its meaning.[7] The Court should

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[7] *E.g., compare BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169, 1187-89 (11th Cir. 2001) (rejecting holdings of district courts in *Bell Atlantic* and *Dallas* district courts that §253(a) limits municipal authority to the areas of right-of-way management and compensation and instead placing on complaining carrier the burden of proving that a local requirement "prohibits or ha[s] the effect of prohibiting service"); *TCG Detroit v. City of Dearborn*, 206 F. 3d 618 (6th Cir. 2000), *affirming* 16 F. Supp. 2d-785 (E.D. Mich. 1998) (holding that a requirement that a carrier obtain a franchise does not constitute a "prohibition" within the meaning of §253(a) and that "fair and reasonable compensation" under §253(c) is not limited to cost recovery but allows cities to charge "rent"); *TCG New York v. City of White Plains*, 125 F. Supp. 2d at 88-89 & 96-97 (§253(a) does not preempt all local regulation not protected by §253(c), whether §253(a) has been violated depends on the facts, and "fair and reasonable compensation" under §253(c) can include rent); *BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. 35, 522 S.E. 2d 804 (S.C. 1999) (franchise ordinance that, among other things, requires notice of mergers and corporate restructuring is consistent with §253(c), and "fair and reasonable compensation" is not limited to cost recovery); *U.S. West v. Arizona Corp. Commission*, 198 Ariz. 208, 217, 8 P. 3d 396, 405 (Ariz. Ct. App. 2000) mere fact that regulatory requirements may be burdensome does not mean that they have "the effect of prohibiting service" within meaning of §253(a)), *with Bell Atlantic*, 49 F. Supp. 2d at 814-16 (§253(a) preempts all burdensome local regulation and any regulation not related to right-of-way management or compensation, and §253(c) restricts *Continued on next page.*

grant review to resolve conflicts among the courts of appeals, as well as other courts, about the meaning of §253(a) and §253(c) and to provide much-needed guidance to the lower courts concerning the proper procedure and burden of proof in §253 claims. The Ninth Circuit's decision in this case represents a serious misinterpretation of federal statutory law and federal rules of procedure that, if allowed to stand, would seriously undermine the ability of thousands of local governments across the nation effectively to regulate the use of public rights-of-way by private for-profit businesses and to protect the taxpaying public's substantial investment in the vital public resource that those rights-of-way represent.

I. THE COURT OF APPEALS' INTERPRETATION OF WHETHER STATE OR LOCAL REQUIREMENTS "HAVE THE EFFECT OF PROHIBITING SERVICE" UNDER SECTION 253(a) IS AT ODDS WITH THIS COURT'S CONSTRUCTION OF LANGUAGE IN A DIRECTLY ANALOGOUS PROVISION OF THE 1996 ACT AND CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The linchpin of the court of appeals' decision was its holding that whether Petitioners' ordinances "have the effect of prohibiting [Qwest's] ability to provide telecommunications service" within the meaning of §253(a) and whether Petitioners' ordinances fell within the right-of-way management and compensation savings clause of §253(c) were "pure issues of law" for which "no further

Continued from previous page.

compensation to fees designed to recover costs); *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N. D. Tex. 1998), *vacated and remanded as moot*, 243 F. 3d 928, *on rehearing*, 249 F. 3d 336 (5th Cir. 2001) (§253(a) preempts all burdensome local regulation and any regulation not related to right-of-way management or compensation); *Austin*, 975 F. Supp. at 939-40 (same); *Qwest v. City of Berkeley*, 146 F. Supp. 2d 1081 (N.D. Cal. 2001) (adhering to court of appeals decision in this case).

factual amplification is necessary." (App. 18a-19a (citations omitted).) It was this holding that led the court of appeals to reach the merits of Qwest's §253 claim and rule in Qwest's favor, even though the district court had not addressed the merits of the §253 claim at all. (App. 19a.)

There can be no question that in §253(a), Congress has "define[d] explicitly" the extent to which it intended to preempt state and local law. *English v. General Electric Co.*, 496 U.S. 72, 78 (1990). The scope of that preemption, however, is not unlimited. It is instead defined, and limited, by the plain language of §253(a): only those state or local requirements that "prohibit or have the effect of prohibiting" a complaining telecommunications service provider's ability to provide service are preempted. *See English*, 496 U.S. at 78. Moreover, in construing this plain language, courts must use "a 'presumption against the preemption of police power regulations' to support a narrow interpretation of such an express command [of preemption]." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Cipollone v. Liggett Group*, 505 U.S. 504, 523 (1992)).

The court of appeals, however, departed from both this presumption and §253(a)'s plain language in ways that are at odds both with this Court's interpretation of very similar language in another provision of the 1996 Act and with how other courts have construed §253(a). According to the court of appeals, §253(a)'s preemption of state and local requirements "is virtually absolute" with no need for factual inquiry into the actual effect that a particular local requirement may have on the complaining telecommunications provider's ability to provide service. (App. 24a.)

A. The Ninth Circuit's holding in this regard appears inconsistent with this Court's construction of a neighboring provision of the 1996 Act with parallel language. In *Iowa Utilities Board*, 525 U.S. at 388, the Court was confronted with the meaning of another provision of

the 1996 Act that required the Federal Communications Commission ("FCC") to consider whether the failure of an ILEC to provide access elements "would impair the ability of [a competing carrier] seeking access to provide the services it seeks to offer," 47 U.S.C. §251(d)(2)(B) (Supp V 1999) (emphasis added). Section 251(d)(2)(B)'s phraseology, "*impair the ability* [of a provider] to provide service," is of course strikingly similar to §253(a)'s phraseology, "*prohibiting the ability* of [a provider] to provide . . . service." In construing §251(d)(2)(B), this Court rejected as "not in accord with the ordinary and fair meaning" of "impair" the "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element. . . causes the failure to provide that element to 'impair' the entrant's ability to furnish its desired services" within the meaning of §251(d)(2)(B). *Iowa Utilities Board*, 525 U.S. at 389-90 (emphasis in original).

If, as this Court held in *Iowa Utilities Board*, an increase in a telecommunications provider's costs or burden does not, without more, necessarily "impair" that provider's ability to provide service, then it is equally true that the mere fact that the ordinance requirements at issue here may increase Qwest's costs or burden, without more, does not necessarily mean that those requirements have the far more draconian effect of "prohibiting" Qwest's ability to provide service within the meaning of §253(a). Yet, by construing §253(a)'s preemptive scope to be "virtually absolute" and disdaining any factual inquiry into Qwest's actual ability to comply with the ordinance requirements at issue or their actual effect on its ability to provide service (App. 24a), that is precisely what the Ninth Circuit held here.

The tortured nature of the court of appeals' reading of "effect of prohibiting" becomes even more glaring when one considers that Qwest is not a new telecommunications service provider whose entry into the market §253(a) was designed to promote, but an ILEC and a BOC, whose entrenched local service monopoly §253(a) was intended to

erode.[8] To assume without any evidence, as the court of appeals did, that an entrenched, multi-billion dollar BOC like Qwest would not or could not comply with the ordinance requirements at issue is not merely contrary to the plain wording and purpose of §253(a), but counterintuitive.

B. The court of appeals' conclusion that whether a local requirement "ha[s] the effect of prohibiting service" is purely an "issue[ ] of law" also conflicts with other courts' and the FCC's interpretation of §253. The FCC has recognized that §253 requires a fact-based inquiry: "Parties seeking preemption of a local legal requirement. . . must supply us with credible and probative evidence that the challenged requirement falls within the proscription of section 253(a) without meeting the requirements of section 253(b) and/or (c)." *In re TCI Cablevision*, 12 FCC Rcd 21396, 21440, ¶101 (1997). Similarly, unlike the court of appeals here, the court in *White Plains*, 125 F. Supp. 2d at 88, observed that:

> the parameters of what is considered prohibitory under §253(a) are not likely to be so broad as to preempt any and all local action [not saved by §253(b) or (c)]. Congress could have achieved that result by simply preempting all local actions in §253(a) rather than specifically dealing only with actions which 'prohibit or [have] the effect of prohibiting' telecommunications services.

And, echoing this Court's construction of the word "inhibit"

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[8] *See, e.g., Iowa Utilities Board*, 525 U.S. at 416 (Breyer, J., concurring in part and dissenting in part) (§253(a) intended to promote "new local entry by dismantling existing legal barriers that would otherwise inhibit it") & 405 (Thomas, J., concurring in part and dissenting in part) (§253(a) intended to "end[ ] States' longstanding practice of granting and maintaining local exchange monopolies" to ILECs and BOCs).

in *Iowa Utilities Board*, the Arizona Court of Appeals held that the mere fact that regulatory requirements may be burdensome does *not* mean that they have "the effect of prohibiting" service within the meaning of §253(a): "Prohibiting entry into a market is distinct from, and more severe than, merely making entry more burdensome." *U.S. West v. Arizona Corp. Commission*, 198 Ariz. at 217, 8 P. 3d at 405.

In essence, the court of appeals improperly rewrote §253(a) to preempt any state or local requirement that imposes some sort of cost or burden on the complaining telecommunications service provider (like filling out a form, providing information, or appearing at a public hearing), regardless whether there is any evidence about whether or not the provider could comply with the requirement or what effect compliance would have on the provider's ability to provide service. Under the court of appeals' "no facts needed" approach, §253(a) would become an open invitation to improper judicial legislation where courts, without benefit of any facts, subjectively assess whether they find the legislative acts of elected local governments unnecessary or unduly burdensome. Such an approach at odds not only with §253(a)'s plain language, but also with the proper role of the judiciary in reviewing legislative acts and with the respect owed the legislative decisions of state and local governments in our system of federalism.

C. The court of appeals' construction of §253(a) also conflicts with a decision of the Eleventh Circuit, *BellSouth Telecommunications v. Town of Palm Beach*, 252 F. 3d 1169 (11th Cir. 2001). The Ninth Circuit held here that the purpose of §253(a)'s "virtually absolute" preemption is to restrict the permissible subject matter of state and local regulation of telecommunications service providers to those matters listed in the safe harbors of §253(b) and (c): "certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has

narrowly circumscribed the role of state and local governments in this arena." (App. 24a.) Among the cases cited by the Ninth Circuit in support of this proposition were two vacated district court decisions, *Dallas*, 8 F. Supp. 2d at 591, and *Bell Atlantic*, 49 F. Supp. 2d at 814, each of which held that §253(a) preempts all state and local regulatory authority over telecommunications service providers other than that specifically preserved in §253(b) and (c).

In *Palm Beach*, the Eleventh Circuit explicitly disagreed with the very aspect of the *Dallas* and *Bell Atlantic* courts' reading of §253(a) on which the Ninth Circuit relied here. 252 F. 3d at 1187-1189. The Eleventh Circuit held:

> Latent in the opinions of the [*Dallas* and *Bell Atlantic* district] courts that have read subsections [253](b) and (c) as independent limitations on state and local authority is the maxim that . . . by expressly reserving certain powers to the state and local governments in (b) and (c), Congress must have intended that only those powers be reserved. While this argument may have some appeal at first blush, we note that if we were to read [§253] (b) and (c) as delineating the absolute boundaries of state and local authority in the field of telecommunications, the ['prohibitory effect'] limitation set forth in subsection [253](a) would be superfluous. Settled principles of statutory construction counsel against such a reading, . . . particularly when it would violate the plain meaning of the statute.

Id. at 1188 (citation omitted). The Eleventh Circuit went on to remand the case to the district court "for further proceedings to determine whether the sections of the [municipal telecommunications] ordinances [at issue]

violate subsection [253](a) because they may prohibit or have the effect of prohibiting the ability of any entity to provide. . . telecommunications service." *Id.* at 1191-92.

The Eleventh Circuit's decision in *Palm Beach* was rendered after the court of appeals' initial April 2001 decision here (247 F. 3d 966) but before its amended opinion of July 10, 2001. (App. 1a.) The *Palm Beach* decision was brought to the Ninth Circuit's attention in the course of Petitioners' Ninth Circuit petition for rehearing, but the court of appeals did not even mention that decision, much less attempt to distinguish it, in its amended opinion.

D. The court of appeals' interpretation of § 253(a) also appears to be at odds with that of the Sixth Circuit in *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000). The court of appeals here suggested that the mere fact that Petitioners' franchising processes contemplate the possibility that a franchise application might be denied "prohibit[s] or ha[s] the effect of prohibiting" a provider's ability to provide service with the meaning of 47 U.S.C. § 253(a). (App. 25a.) The court of appeals went on to state that the "ultimate cudgel" of Petitioners' ordinances is that "each city reserves discretion to grant, deny, or revoke franchises" (App. 26a).

The Sixth Circuit in *Dearborn*, in contrast, dismissed such reasoning as "sophistry." 206 F.3d at 624. In *Dearborn*, much as here, a telecommunications provider argued that the mere fact that it needed to apply for a franchise, which a city might or might not grant, constituted a "prohibition" under § 253(a). The Sixth Circuit had no difficulty rejecting the argument:

> [The complaining telecommunications service provider] attempts to characterize the City's ordinance as a prohibition, itself prohibited by 47 U.S.C. § 253(a). . . . [It] then describes the fee required to obtain the franchise as an afterthought, which conditionally lifts that prohibited

> prohibition. This is sophistry. The provider must apply for a franchise; the City assesses a franchise fee; no fee paid, no franchise given. That cannot 'be described as a prohibition [within the meaning of Section § 253(a)].' . . .The issue here is not . . . a municipality's withholding of consent to a franchise application, something the City never contemplated vis-à-vis [the complaining provider].

206 F.3d at 624 (citations omitted).

As in *Dearborn*, the issue in this case is *not* Petitioners' withholding of consent to Qwest's franchise application; to the contrary, Qwest never even applied for a franchise, and there is no evidence in the record remotely suggesting that, had Qwest applied for a franchise and fulfilled the ordinance requirements, Petitioners would not have granted it a franchise. Thus, the court of appeals' effort to distinguish the Sixth Circuit's *Dearborn* decision on this point is illusory. Absent some evidence that Qwest could not comply with the ordinance requirements at issue or that Petitioners would in fact deny Qwest a franchise, the supposed "variety of methods and bases on which a city may deny a franchise" (App. 27a n.11) is no different than the single potential basis for denial of a franchise upheld in *Dearborn*. The court of appeals' decision here therefore conflicts with *Dearborn*.

The conflict created by the Ninth Circuit's reading of §253(a) and that of the Sixth and Eleventh Circuits is of great moment, as it will result in varying degrees of federal intrusion into local municipal police powers depending on the geographic happenstance of where a particular municipality is located. Such inconsistency is inherently offensive to both of the values §253 seeks to balance: promoting competition in local telecommunications markets and, at the same time, preserving the dual

sovereignty inherent in our system of federalism. Only the Court can resolve this conflict, and it should do so.

II. THE COURT OF APPEALS' RESOLUTION OF THE MERITS OF A SECTION 253 CLAIM IN CLAIMANT'S FAVOR ON THE PLEADINGS IS CONTRARY TO THE DECISIONS OF THIS COURT CONCERNING APPROPRIATE STANDARDS FOR REVIEW.

A. Perhaps the most striking aspect of the court of appeals' decision to reach and resolve the merits of Qwest's §253 claim is the procedural posture in which it occurred. After Qwest filed its §253 counterclaim in the district court, Petitioners filed a responsive pleading denying the pertinent factual allegations in Qwest's counterclaim. Qwest then filed a motion pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings on its own counterclaim against Petitioners, which the district court dismissed as unripe. (App. 39a & 45a-46a.) The court of appeals subsequently reviewed Qwest's §253 counterclaim on what it believed was a Rule 12(c) standard of review: "[w]hether, on the facts alleged, Qwest is entitled to judgment as a matter of law." (App. 23a (citing Ninth Circuit Fed. R. Civ. P. 12(c) precedent).)

The problem is that the court of appeals got the Fed. R. Civ. P. 12(c) standard backwards. It is hornbook law that, in assessing a Rule 12(c) motion for judgment on the pleadings, a court "is required to view the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party," and "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5A C. Wright & A. Miller, Federal Practice and Procedure §1368, at pp. 519-20 (2d ed. 1990). The Court recognized this principle long ago, holding that where, as here, a plaintiff moves for judgment on the pleadings on its own

claim, all of the allegations in the defendant's responsive pleading must be treated as established. *National Metropolitan Bank v. U.S.*, 323 U.S. 454, 456-57 (1945).

The court of appeals decision directly conflicts with *National Metropolitan Bank*. Apparently confused by the fact that, unlike most Rule 12(c) motions, here the counterclaim plaintiff was moving for judgment on the pleadings with respect to its own claim, the court of appeals mistakenly assumed the truth of "the facts alleged" in Qwest's counterclaim (App. 23a), thereby viewing the facts and inferences in the light most favorable to the moving party, Qwest, and *against* the *non*-moving parties, the Petitioners.

This conclusion is confirmed by the balance of the court of appeals' opinion, where despite its suggestion that "[n]o further factual record would narrow or clarify [the §253] issue" (App. 19a), the court of appeals did in fact draw several factual inferences concerning the effect of Petitioners' ordinances on Qwest, uniformly drawing such inferences in Qwest's favor. Thus, for example, the court of appeals referred to the Petitioners' ordinance requirements as "costly and burdensome" (App. 19a), even though there was no evidence in the pleadings or the record concerning the costs or burdens of complying with those requirements, much less any evidence that any such costs or burdens would be prohibitive for a multi-billion dollar BOC like Qwest.

In fact, had the court of appeals drawn all factual inferences in favor of Petitioners, as Rule 12 and court precedent required it to do, the court of appeals could not have properly concluded on the pleadings that the ordinance requirements at issue necessarily had "the effect of prohibiting the ability" of Qwest to provide service. For aught that appears in the pleadings (and the record), the court would have been justified in inferring that (1) Qwest was able to comply with each of the ordinance requirements at issue; (2) Qwest would have complied with those requirements if it had been compelled to do so rather

than exiting the market; and (3) had Qwest complied with the ordinance requirements, Petitioners would have in fact granted it a franchise. Indeed, given Qwest's status as an entrenched BOC, these factual inferences would not only have been plausible, but perhaps the most logical ones to make. These obvious and permissible inferences in Petitioners' favor, standing alone, should have precluded any possible conclusion on the pleadings that the ordinance requirements at issue had "the effect of prohibiting" Qwest's ability to provide service.

The same error plagues the court of appeals' analysis of the §253(c) safe harbor for right-of-way management and compensation. With only the text of the ordinances before it and without any benefit of evidence and testimony explaining the background and purpose of each of the ordinance requirements at issue, the court of appeals proceeded to speculate that several of those requirements were unrelated to management of the right-of-way. (App. 29a-32a.) In so doing, the court of appeals substituted a "children's ditty" for the absent facts (App. 33a), as a result impermissibly drawing factual inferences against Petitioners, the non-moving parties.

Because the court of appeals departed from prior longstanding decisions of the Court and settled construction of an important rule of federal civil procedure, review is warranted.

B. By proceeding to the merits of the §253 claim on the pleadings when the district court had dismissed that claim on ripeness grounds, the court of appeals also appears to have departed from this Court's teaching in *Singleton v. Wulff*, 428 U.S. 106 (1976). In *Singleton*, much as here, a district court dismissed a plaintiff's claim on standing grounds without reaching the merits, and the court of appeals reversed the district court's decision on standing but then proceeded to the merits and ruled in plaintiff's favor. *Id.* at 110-112. This Court reversed, holding, *inter alia*, that the court of appeals resolution of the

merits was "an unacceptable exercise of its appellant jurisdiction." *Id.* at 119-20.

The Court began by noting the "general rule" that "a federal appellate court does not consider an issue not passed upon below." *Id.* at 120. This general rule is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have no opportunity to introduce evidence." *Id.* (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

To be sure, *Singleton* recognized that "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal," and "announce[d] no general rule." 428 U.S. at 121. The Ninth Circuit here cited *Singleton* but nevertheless concluded that proceeding to the merits was appropriate because, in its view, Qwest's §253 claim presented only "pure issues of law that were briefed extensively before the district court and again before the court of appeals." (App. 19a.)

The court of appeals' analysis, however, is flawed in two fundamental respects. First, it overlooked that, while the parties did indeed touch on the merits of Qwest's §253 claim in their briefs, one of the arguments that Petitioners made in those briefs was that further discovery and factual development were required to resolve the §253 claim. Second, the premise of the court of appeals' decision not to apply *Singleton*'s general rule -- that §253 presents only "pure issues of law" -- is itself erroneous (*see* Parts I and II (A), *supra*) or, in any event, one on which courts are sharply divided (*see id.* & note 7 *supra*). One conclusion is clear: The §253 issues addressed by the court of appeals are hardly ones "where the proper resolution is beyond any doubt" and are instead issues that "have never been passed upon in any decision of this Court." *Singleton*, 428 U.S. at 121. This Court's review is warranted to correct the court of appeals'

error so that, in resolving the important federal issues presented by §253, future litigants "have the opportunity to offer all the evidence they believe relevant to the issues. . . . " *Id.* at 120 (quoting *Hormel*, 312 U.S. at 556).

III. THE COURT OF APPEALS' RULING THAT "FAIR AND REASONABLE COMPENSATION" FOR USE OF RIGHTS-OF-WAY UNDER §253(c) IS LIMITED TO RECOVERING THE COST OF MAINTAINING THE RIGHT-OF-WAY CONFLICTS WITH THE DECISION OF ANOTHER CIRCUIT AND PRESENTS AN IMPORTANT AND RECURRING ISSUE ON WHICH COURTS ARE DIVIDED.

Section 253(c) provides that municipalities may charge "fair and reasonable compensation" for telecommunications service providers' use of local rights-of-way. Twice in its opinion, the court of appeals stated that §253(c) restricts the fees that municipalities may charge for use of rights-of-way to an amount "based on costs of maintaining the rights-of-way." (App. 26a & 33a n. 19.) Review is warranted because the court of appeals' ruling on this issue conflicts with that of another circuit, as well as that of several other courts, and because the court of appeals incorrectly resolved this important and recurring federal statutory issue.

A. The court of appeals' ruling that the 1996 Act limits "fair and reasonable compensation" to fees "based on the costs of maintaining the right of way" conflicts with the holding of the Sixth Circuit in *TCG Detroit v. City of Dearborn*, 206 F. 3d at 624-25. In *Dearborn*, the Sixth Circuit explicitly rejected the argument that "fair and reasonable compensation" within the meaning of §253(c) is limited to recovery of costs, held that "'costs' and 'compensation' are not the same," and affirmed a district court decision finding that a gross revenue-based fee was "fair and reasonable

compensation" within the meaning of §253(c). 206 F. 3d at 624-25. Also, unlike the "no facts needed" approach of the court of appeals here, the Sixth Circuit held that whether a fee is "fair and reasonable compensation" depends on "the totality of the circumstances." *Id.* at 625. In its amended opinion, the court of appeals here for the first time added a reference to the Sixth Circuit's *Dearborn* decision, but ignored the conflict between the non-cost based "fee requirement" upheld in *Dearborn* (App. 27a n.11) and the cost-based limitation endorsed in its own opinion (App 26a & 33a n. 19).

Moreover, the conflict over the meaning of "fair and reasonable compensation" under §253(c) extends beyond the decision below and the Sixth Circuit's *Dearborn* decision. Several other courts have addressed the issue, with most holding that "fair and reasonable compensation" under §253(c) is not restricted to cost reimbursement but instead contemplates rent for use of public property,[9] while others, like the Ninth Circuit here, have concluded that compensation under §253(c) is restricted to reimbursement of a municipality's costs of maintaining or managing the right-of-way.[10] Nor are these conflicts merely implicit. To the contrary, these courts have explicitly recognized their

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9 *E.g., White Plains*, 125 F. Supp. 2d at 96 ("fair and reasonable compensation" under §253(c) not limited to costs; gross revenue-based fee upheld); *TCG Detroit v. City of Dearborn*, 16 F. Supp. 2d at 789 (same); *BellSouth Telecommunications v. City of Orangeburg*, 337 S.C. at 43, 502 S.E. 2d at 808 (same); *Omnipoint Communications v. Port Authority of New York and New Jersey*, 1999 WL 494120 at *6-8 (S.D.N.Y. 1999) ("fair and reasonable compensation" allows "local governments to charge rental fees" and is not limited to costs).

10 *E.g., City of Berkeley*, 146 F. Supp. 2d at 1100 (following Ninth Circuit's decision here and holding "fair and reasonable compensation" is limited to recovery of costs); *Bell Atlantic*, 49 F. Supp. 2d at 817 (same); *PECO v. Township of Haverford*, 1999 U.S. Dist. LEXIS 19409 (E.D. Pa. 1999) (same).

disagreements with one another on this issue.[11]

The number of decisions and divergent results to date leave little doubt that this issue is and, without this Court's guidance, will continue to be, a recurring question. The issue's importance should be equally clear. Given the increased competition promoted by the 1996 Act and the resulting substantially increased use of municipal streets and rights-of-way by telecommunications service providers, the question of what constitutes "fair and reasonable compensation" for right-of-way use under §253(c) has enormous fiscal implications for not only all local governments across the nation, but their taxpaying residents as well. The Court therefore should grant review.

B. The court of appeals' ruling that "fair and reasonable compensation" under §253(c) is restricted to cost reimbursement is also demonstrably incorrect. The court of appeals offered no explanation for its ruling on this issue (App. 26a & 33a n. 19), and for good reason: It directly conflicts with the plain meaning of "fair and reasonable compensation," how courts have historically construed that phrase, and the legislative history of §253(c).

Certainly the common and ordinary meaning of "fair and reasonable compensation" does not connote mere reimbursement of costs. *Black's Law Dictionary* at 277 (7th ed. 1999), for instance, defines the terms "just compensation" and "adequate compensation" for use of property as "the property's fair market value."

In enacting § 253(c), Congress is of course presumed to be aware of previous interpretations of similar language. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Precedent construing analogous terms lends no support to the court of appeals' crabbed construction of "compensation." The

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[11] *See, e.g., White Plains*, 125 F. Supp. 2d at 96 (agreeing with *Dearborn*, *Omnipoint* and *Orangeburg* courts, and disagreeing with *Bell Atlantic* court, on this point).

Takings Clause of the Fifth Amendment, for instance, contains the very similar phrase "just compensation." And the law is clear that the "compensation" to which a person is entitled under the Takings Clause is not mere reimbursement of costs, but fair market value. *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984). The law is equally clear that local governments, no less than private parties, are entitled to fair market value as "compensation" under the Takings Clause. *Id* at 31 & n.15.

Moreover, this Court has long recognized that franchise fees which municipalities receive from utilities for right-of-way use are a form of rent. *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 98-99 (1893). Other courts across the nation have consistently reached the same conclusion, in the context of both local telephone and local cable television franchises.[12]

Congress' use of the phrase "fair and reasonable compensation" in §253(c) evinces a clear intent to preserve, rather than to upend, the longstanding principle that franchise fees are a form of rent and need not be cost-based. And the legislative history of §253(c) confirms that conclusion. As stated by the sponsor of the successful amendment to the House version of what became the 1996

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12 *E.g., City of Dallas v. FCC*, 118 F. 3d 393, 397 (5th Cir. 1997) (5% franchise fee allowed by 47 U.S.C §542 is a "form of rent" for "use of rights-of-way"); *City of Albuquerque v. New Mexico Public Service Commission*, 115 N.M. 521, 533, 854 P.2d 348, 360 (N.M. 1993) (gross receipts-based franchise fee is rent for use of local rights-of-way); *Telesat Cablevision, Inc. v. City of Riviera Beach*, 773 F. Supp. 383, 407 (S.D. Fla. 1991) (same); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954, 962-63, 972-74 (N.D. Cal. 1987), *further proceedings* 679 F. Supp. 977, 979-80 (1988)(same); *Erie Telecommunications v. City of Erie*, 659 F. Supp. 580, 595 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988) (same); *City of Richmond v. Chesapeake & Potomac Tel. Co.*, 205 Va. 919, 924, 140 S.E.2d 683, 687 (Va. 1965) (same); *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 44 Cal.2d 272, 283, 282 P.2d 36, 43 (Cal. 1955) (same).

Act that conformed the House bill's language to the language now found in §253(c), the provision is intended to "explicitly guarantee[ ] that cities and local governments have the right not only to control access within their city limits, but also to set the compensation level for use of that right-of-way. . . . The Federal Government has absolutely no business telling State and local governments how to price access to their local right-of-way."[13]

In short, Congress intended the phrase "fair and reasonable compensation" in §253(c) to shield against federal intrusions into a municipality's ability to control its own public property and receive rent-based compensation for its use by private businesses. The court should grant review to address the important issue of federalism threatened by the court of appeals' decision below.

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[13] 141 Cong. Rec. H 8460 (daily ed. Aug. 4, 1995) (remarks of Rep. Barton). *Accord id.* at H8460-61 (remarks of Rep. Stupak) (what is now §253(c) allows gross revenue-based fees) & *id.* (remarks of Rep. Bliley) (opponents of amendment also agree that what is now §253(c) allows gross revenue-based fees).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

APPENDIX A
UNITED STATES COURT OF APPEALS
OR THE NINTH CIRCUIT

CITY OF AUBURN; CITY OF BREMERTON; CITY OF DES MOINES; CITY OF FEDERAL WAY; A MUNICIPALITY; CITY OF LAKEWOOD; CITY OF MEDINA; CITY OF OLYMPIA; CITY OF PUYALLUP; CITY OF RENTON; CITY OF SEATAC; CITY OF TACOMA; CITY OF TUKWILA; CITY OF UNIVERSITY PLACE; CITY OF VANCOUVER,	)	Nos. 99-36173 99-36219
Plaintiffs-Appellees-Cross-Appellants,	)	D.C. No. CV-98-05595-FDB
v.	)	ORDER AND AMENDED OPINION
QWEST CORPORATION, *Defendant-Appellant-Cross-Appellee.*	)	

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
February 6, 2001—Seattle, Washington
Filed April 24, 2001
Amended July 10, 2001

Before: Pamela Ann Rymer, Sidney R. Thomas, and
M. Margaret McKeown, Circuit Judges.

Opinion by Judge McKeown

COUNSEL

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Carol S. Arnold, Preston Gates & Ellis LLP, Seattle, Washington, for the appellee/cross-appellants.

ORDER

The Opinion filed April 24, 2001 is amended as follows:

1. At 247 F.3d at 980, section II.C.1, second paragraph: Replace sentence reading: "A number of courts have held that various requirements imposed by local ordinances constitute a prohibition within the meaning of § 253(a)." with "A number of courts have held that certain requirements imposed by local ordinances constitute a prohibition within the meaning of §253(a)."

2. At 247 F.3d at 981, section II.C.1, third paragraph: Replace sentence reading: "The ordinances at issue in the present case include several features that have the effect of prohibiting the provision of telecommunications services."

with "The ordinances at issue in the present case include several features that, in combination, have the effect of prohibiting the provision of telecommunications services."

3. At 247 F.3d at 981, section II.C.1, third paragraph:

Delete sentence reading: "The Counterclaim Cities require application fees ranging from an undetermined amount (in Olympia) [FN 10] to $2,500 in Auburn and $5000 (in Des Moines and Tacoma)."

4. Delete footnote 10.

5. At 247 F.3d at 981, section II.C.1, fourth paragraph: Delete first two sentences and citation, and replace with the following:

> "Taken together, these requirements 'have the effect of prohibiting' Qwest and other companies from providing telecommunications services, see *City of Dallas*, 52 F. Supp. 2d at 770, and create a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets."

At the end of the same paragraph, add the following as a new footnote:

> "The Sixth Circuit noted that a regulation that allows denial of a franchise does not alone constitute a prohibition within the meaning of § 253(a). *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6th Cir. 2000) (holding that a fee requirement is not pre-empted by § 253(a)). As in *City of Austin*, 975 F. Supp. at 939, our conclusion is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone. *See TCG Detroit*, 206 F.3d at 624 (citing *City of Austin* with approval)."

6. At 247 F.3d at 981-82, section II.C.2, first paragraph:

Delete first two sentences, and replace with: "Of course, a franchise requirement per se is not preempted by the Telecom Act. Only regulations that do not fall within a safe harbor pro-vision, such as § 253(c), are preempted."

7. At 247 F.3d at 982, section II.C.2, paragraph beginning "Applying these guidelines:" Delete first sentence, and replace with: "Applying these guidelines, coupled with common sense, it is apparent that the ordinances establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way."

8. At 247 F.3d at 985 n.19, replace "negotiation and acceptance" with "negotiations of the terms and discretionary acceptance".

With the foregoing amendments to the opinion, the panel has unanimously voted to deny appellees/cross-appellants' petition for rehearing.

The full court has been advised of the appellees/cross-appellants' suggestion for rehearing en banc, and no active judge of the court has requested a vote on whether to rehear the matter en banc. Thus, the suggestion for rehearing en banc is rejected.

OPINION

McKEOWN, Circuit Judge:

This case presents issues of first impression concerning the relationship between various Washington municipalities and a major telecommunications provider, Qwest Corporation. We are called upon to decide (1) whether an ambiguous tariff filed with the state utilities commission

trumps the common law and statutory rule that the utility company, rather than the municipality, bears the expense for a facility relocation made necessary by right-of-way improvements, and (2) whether state law and the Federal Telecommunications Act of 1996 preempt certain city ordinances that establish a franchise system to manage telecommunications facilities in rights-of-way. We conclude that the tariff does not require the municipalities to shoulder the relocation costs, and that the ordinances are preempted.

In 1998, the cities of Auburn, Bellingham, Bremerton, Des Moines, Federal Way, Fife, Lakewood, Medina, Olympia, Puyallup, Renton, SeaTac, Shoreline, Spokane, Tacoma, Tukwila, University Place, and Vancouver ("the Cities") brought suit against Qwest in state court. They argued that, as a condition of Qwest's right to use the rights-of-way along city streets and roads, it was required by statutory and common law to relocate or pay for relocation of its facilities. Qwest removed the case to federal court, and filed a counterclaim against Auburn, Des Moines, Olympia, Tacoma, and University Place[1] (the "Counterclaim Cities") seeking a declaratory judgment that state law and the Federal Telecommunications Act of 1996 preempt the municipal ordinances establishing franchise and fee systems.

The district court granted summary judgment to the Cities on the relocation costs claim, and dismissed as unripe Qwest's counterclaim challenging the franchise ordinances. Both the Counterclaim Cities and Qwest appealed. These consolidated appeals involve two distinct issues —

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[1] The City of University Place has since revised its ordinances and was dismissed from the case.

relocation costs and the preemption of city ordinances — which we discuss separately.

DISCUSSION

I. RELOCATION COSTS

Under Washington common and statutory law, when city street improvements require the displacement of telecommunications equipment located in the city's right-of-way, the utility company bears the expense of relocating the equipment.[2] This has been the rule in Washington since before statehood. On February 21, 1996, Qwest (then U S West), notified cities and counties in western Washington that it would no longer bear these relocation costs. In support of its announcement, Qwest took the position that its tariff of rates and services, filed with the Washington Utilities and Transportation Commission ("WUTC") in 1967 and adopted without objection in 1968, shifted the payment burden to the cities. That tariff, WN U-31, has been revised and amended over the years; the current version reads in relevant part:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new and removing the old facilities will be borne by the customer or others requesting the relocation or conversion.

WN U-31 para. 4.6.C

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[2] *See* RCW § 80.36.040; *State of Washington v. Public Util. Dist. No. 1 of Clark County*, 349 P.2d 426, 429-30 (Wash. 1960) (describing the common law rule).

Relying on this language, Qwest refused to relocate or pay for relocation of its facilities to accommodate street improvement or relocation. This resulted, in at least one instance, in a Qwest-owned telephone pole standing in the middle of a newly-widened road. Later, Qwest agreed to relocate its equipment, but notified the cities of its intent to seek reimbursement for related costs.

After this appeal was filed and partially briefed, the Washington legislature passed major telecommunications legislation, entitled, "An Act relating to the use of city or town rights of way by telecommunications and cable television providers." Engrossed Substitute Senate Bill 6676 ("ESSB 6676"). The parties agree that ESSB 6676, codified at WASH. REV. CODE ("RCW") § 35.99.010 et seq., super-sedes Qwest's tariff and prospectively imposes the cost of relocating telecommunications facilities in city streets on the utility company.[3] Therefore, the question before us is limited to who bears the costs of relocation prior to the effective date of the new statute. We review de novo the district court's grant of summary judgment. *Weiner v. San Diego County*, 210 F.3d 1025, 1028 (9th Cir. 2000).

A. STATUTORY AND COMMON LAW BACKGROUND

[1] We begin with the principle—with which both parties agree—that under Washington common law, the utility must pay the cost of relocation if required by public

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[3] The Counterclaim Cities moved for partial summary judgment on Qwest's counterclaim, and sought an order declaring prospectively that they have authority to require undergrounding. The district court denied the motion when it dismissed the counterclaim for lack of ripeness. The Counterclaim Cities' appeal of this issue is rendered entirely moot by ESSB 6676, which makes clear that cities "may require service providers to relocate authorized facilities . . . ." RCW § 35.99.060. By definition, this relocation includes undergrounding.

necessity. This stems from the conditional nature of a utility's right to have facilities in the public right-of-way. When the government allows a telecommunications company to place facilities in that right-of-way, the facilities' presence is contingent on the company's cooperation with maintenance and improvement of the street. 12 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 34.74.10 (3d ed. 1970) ("it is generally held that the municipality may require a change in the location of pipes or other underground facilities of the grantee of a franchise, where public convenience or security require it"). This general rule is followed in virtually every jurisdiction, *id.* at n.6 (noting that only Arkansas is in conflict), and has been embodied in Washington common and statutory law since before statehood in 1889.

The statutory rule can be traced to the old federal Post Roads Act, which required telegraph companies to maintain their lines so as "not to obstruct . . . or interfere with the ordi-nary travel on such military or post roads." U.S. REV. STATS § 5263, 14 Stat. 221 (1866). The territorial legislature similarly provided that the right to construct telegraph lines was subject to the requirement that such lines "not unnecessarily obstruct[ ]" rights-of-way. 1866 Wash. Laws, approved January 18, 1866.

This rule continued to apply after statehood. Although the Washington Constitution recognized the right of telecommunications companies to construct and maintain facilities, it specifically authorized the legislature to adopt "reasonable regulations" relating to those facilities. WASH. CONST. Art. XII, § 19. Indeed, the state legislature in its first session adopted a statute allowing telecommunications companies to construct facilities in rights-of-way "in such manner and at such points as not to incommode the public

use of the . . . highway[.]" 1889-90 Wash. Laws (now codified at RCW § 80.36.040).

[2] The "as not to incommode the public use" language of § 80.36.040 has been interpreted by the Washington Supreme Court to allow a city to require the utility company to pay for relocation costs when a public street is improved or altered. *City of Seattle v. W. Union Tel. Co.*, 153 P.2d 859, 868-69 (Wash. 1944); *City of Edmonds v. Gen. Tel. Co.*, 584 P.2d 458, 463 (Wash. Ct. App. 1978). The Washington Supreme Court has continued to hold that any right accorded to a utility company to maintain structures in public streets is subject to the state's police power, and the company must bear the expense of changes required by public convenience and necessity unless otherwise agreed. *See Wash. Natural Gas Co. v. City of Seattle*, 373 P.2d 133, 135-36 (Wash. 1962); *P.U.D. No.* 1, 349 P.2d at 429.

[3] Today, the classic statement of the rule in Washington is that "public utility companies operating under a franchise must bear the cost of removing and of relocating their facilities, as it is made necessary by highway improvements." *P.U.D. No.* 1, 349 P.2d at 429-30. This rule "may be changed by contract between the utility and a municipality so that relocation expenses are borne by the municipality, or may be changed by statute so that relocation expenses in certain cases are borne by the state, or the municipality." *Gen. Tel. Co. v. City of Bothell*, 716 P.2d 879, 882 (Wash. 1986) (quoting MCQUILLIN § 34.74(a)).

B. EVOLUTION OF QWEST'S TARIFF

Qwest argues that this rule was changed by tariff WN U-31, originally filed by Qwest in 1967 and adopted by the WUTC in 1968. The original tariff read, in relevant part:

> [I]f the Company is requested to relocate its facilities underground, or if the Company is required by law to relocate its facilities underground, the cost of such relocating construction shall be borne by the owners of the real property served or by others requesting such relocation construction.
>
> Pacific Northwest Bell Telephone Co.
> Rules and Regulations No. 23

The current language, first adopted in 1989 — more than twenty years later — reads:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new and removing the old facilities will be borne by the customer or others requesting the relocation or conversion.
>
> WN U-31 para. 4.6.C

The difference between the two versions is significant; the original tariff is directed solely at undergrounding (that is, locating utility facilities underground), which has been encouraged in recent decades for aesthetic and safety reasons. Tariff WN U-31, however, has a different scope; it is not restricted to undergrounding, but purports to apply to *all* relocation. This broader language first appears in 1989; nothing in the record explains the purpose or intent of the change, and Qwest acknowledges that it first invoked the tariff to demand relocation costs in its 1996 letter to the Cities.

C. ANALYSIS

The question, then, is whether Qwest's current tariff altered its common law and statutory obligation to foot the bill for relocation costs. Qwest takes the position that the tariff language stating that relocation costs "will be borne by the customers or others requesting the relocation or conversion" includes the cities within the term "others." Qwest further argues that this tariff is equivalent to statutory law, and there-fore alters the prior rule.

[4] It is true that a tariff properly filed and authorized by law can alter the common law, at least between a utility and its customers. In *Moore v. Pac. Northwest Bell,* the Washington Court of Appeals noted that "[t]hese tariff schedules have the force of law and bind telephone customers." 662 P.2d 398, 403 (Wash. Ct. App. 1983). In *Allen v. Gen. Tel. Co.,* the Court of Appeals concluded that a tariff limiting the telephone company's liability for misprinting a directory "becomes a part of the law of this State." 578 P.2d 1333, 1337 (Wash. Ct. App. 1978).

[5] It is well settled, however, that tariffs are read to be consistent with preexisting statutory law, and cannot repeal or supersede a statute. *See People's Org. for Washington's Energy Res. v. Washington Util. and Transp. Comm'n,* 679 P.2d 922, 927 (Wash. 1984) (tariff may not set terms that conflict with statute); *Nat'l Union Ins. Co. v. Puget Sound Power & Light,* 972 P.2d 481, 484-86 (Wash. Ct. App. 1999) (holding that a tariff that purported to absolve utility from liability was ambiguous, and should not be interpreted in conflict with statutes). In this case, RCW § 80.36.040 authorized the city to require the utility to pay relocation costs. Qwest's tariff can-not, by itself, nullify that statute. This is especially true where, as here, the tariff is ambiguous.

General Telephone Co. v. Bothell, the case that Qwest views as dispositive, does not hold otherwise. *Bothell* involved a city ordinance that purported to exempt a city from the provisions of a utility tariff relating to undergrounding. In 1971, the WUTC adopted WAC § 480-120-076, providing that "[e]ach telephone utility shall set forth in its tariff its conditions for providing underground facilities." In 1977, pursuant to that regulation, General Telephone filed a tariff passing the costs to "the owners of real property served along the route of the constructed facility or to others requesting such relocation construction." *Bothell*, 716 P.2d at 881. Bothell, in 1981 and 1982, enacted ordinances requiring the utility company to pay for undergrounding of aerial wires — that is, purporting to supersede the statewide tariff authorized by the regulation. General Telephone challenged the validity of the ordinances and argued that the tariff required Bothell, not General Telephone, to pay for undergrounding. The Washington Supreme Court first recognized that the tariff in that case was the law of the state before Bothell passed its ordinances. *Bothell*, 716 P.2d at 882-84. Stating that a city may not usurp the functions of the state public service commission, *Bothell* held that the city's ordinances were invalid where they conflicted with the tariff. *Id.*

Qwest argues that *Bothell*'s statement that "[t]ariffs enacted pursuant to such WUTC regulation have the force of state law and are preemptive authority over subsequently enacted city ordinances," 716 P.2d at 882, requires us to hold that Qwest's tariff supersedes or preempts statutory law. *Bothell* does no such thing. First, the tariff in *Bothell* was adopted pursuant to a specific administrative code provision directing the utility to include undergrounding costs in its tariff. Unlike relocation costs, neither Washington common law nor RCW § 80.36.040 encompassed allocation of undergrounding costs.

Bothell did not involve the tension between the unambiguous common law (later codified) and an ambiguous tariff. Second, the *Bothell* opinion makes perfect sense when viewed in context — it would be absurd for a city to be able, by ordinance, to exempt itself from a prior tariff that was validly enacted and authorized by regulation. But that is not the case here, where the tariff at issue was not required by regulation, and where the Cities do not seek, by ordinance, to avoid compliance with a tariff.

[6] Because it is well settled that a tariff cannot repeal a statute, we need not reach the question whether Qwest's tariff has the force of law or whether the tariff does in fact purport to change the prior rule.[4] We hold that Qwest's tariff did not alter the long-established and unbroken rule established at common law and in RCW § 80.36.040 that the utility company must pay relocation costs.

II. Preemption Of The Cities' Ordinances

The next issue that confronts us is the question of state and federal preemption of local ordinances regulating telecommunications.

[7] We begin with the Telecommunications Act of 1996 (the "Act" or the "Telecom Act"), Pub. L. 104-104, 110 Stat. 56 (1996), which was passed to promote competition among and reduce regulation of telecommunications providers.[5]

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[4] In addition, we need not consider whether *Pierce County v. U S West*, No. 97-2-08395-3 (Wash. Sup. Ct. March 13, 1998) (holding that "or others" language in the identical tariff does not include municipalities), collaterally estops Qwest from challenging the tariff.

[5] The full title of the Act is "An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The conference committee report noted that the purpose of the statute is to provide for a

To this end, the Act prohibits state and local governments from creating "barriers to entry," legal requirements that prohibit or have the effect of prohibiting a company from providing telecommunication service. 47 U.S.C. § 253 (Supp. IV 1999). Section 253 begins with a broad prohibition against state and local regulation, followed by certain narrow exceptions that leave a "safe harbor" for limited local regulation. One of these safe harbors, established by § 253(c), allows a local government to manage and collect fees for the use of public rights-of-way by telecommunication providers.

After the passage of the Act, the Counterclaim Cities (Auburn, Olympia, Tacoma, Des Moines, and University Place) passed ordinances that govern the use of public rights-of-way by telecommunications companies by requiring companies to obtain a "franchise," or permit. These ordinances are not identical, but are substantially similar. Under each ordinance, any telecommunications service provider that wishes to operate in the city must apply to the city for a franchise. Only franchised telecommunications companies may obtain permits to install facilities in public rights-of-way. Franchised companies are subject to extensive cost reporting obligations and controls over such matters as changes of stock ownership. The ordinances also require the company to provide excess capacity, and to offer services to the city at best-available rates. Three of the Counterclaim Cities charge a fee of between $2500 and $5000 to apply for a franchise. Each city reserves the right to grant, deny, or revoke a franchise for unnamed criteria, and in the discretion of the city. Finally, the ordinances provide that a city may remove the facilities of a company operating

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"procompetitive, de-regulatory national policy framework." H. R. Rep. No. 104-458 (1996).

without a franchise, and a company operating without a franchise is subject to civil and criminal penalties.

Qwest's counterclaim seeks a declaratory judgment that the Counterclaim Cities' ordinances are preempted by state law and by the Telecom Act.

A. RIPENESS

The district court dismissed Qwest's counterclaim as unripe, primarily on the grounds that "the analysis would be better conducted following specific attempts by the Counter-claim Cities to enforce their telecommunications ordinances." *Auburn v. U S West*, 79 F. Supp.2d 1214, 1218 (W.D. Wash. 1999). We review de novo the district court's dismissal of the counterclaim for lack of ripeness. *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1131 (9th Cir. 1998).

[8] The "basic rationale" of the ripeness requirement is "[t]o prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements[.]" *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977). To determine whether Qwest's counterclaim is ripe for review, we evaluate (1) whether the issues are fit for judicial decision, and (2) whether the parties will suffer hardship if we decline to consider the issues. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1132 (9th Cir. 1996) (citing *Abbott Lab.*, 387 U.S. at 149).

The ripeness inquiry has a constitutional component rooted in the "case or controversy" requirement of Article III, and a prudential component that focuses on whether the record is adequate to ensure effective review. *See Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134,

1139 (9th Cir. 2000) (en banc). We address the constitutional component first, as it is jurisdictional, then proceed to the two-prong prudential inquiry required by *Abbott Laboratories*.

1. Constitutional Component

[9] We may not hear a case unless "there exist[s] a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.' " *Thomas*, 220 F.3d at 1138 (quoting *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 93 (1945)). This tenet of ripeness requires us to consider whether the plaintiffs face "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement," or, by contrast, if the alleged injury is too "imaginary" or "speculative" to support jurisdiction. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). We have little trouble concluding that this case satisfies the "case or controversy" requirement, and therefore the constitutional component of ripeness.

[10] The case before us is remarkably similar to *Abbott Laboratories* and its companion cases, decided the same day. There, the Supreme Court held, the very promulgation of a law may itself affect a party enough to satisfy the constitutional requirement: "[t]here is no question in the present case that petitioners have sufficient standing as plaintiffs: the regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions." *Abbott Lab.*, 387 U.S. at 154. If "[p]romulgation of the challenged regulations present[s] plaintiffs with the immediate dilemma to choose between complying with newly imposed, disadvantageous

restrictions and risking serious penalties for violation," the controversy is ripe. *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 (1993) (construing *Abbott Lab.*). This is particularly true when the regulations are burdensome and immediate. *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 170 (1967) (noting the "immediate severity of the regulations' impact upon the plaintiffs"); *id.* at 173 ("[I]t is quite clear that if respondents, failing judicial review at this stage, elect to comply with the regulations and await ultimate judicial determination of the validity of them in subsequent litigation, the amount of preliminary paper work, scientific testing, and recordkeeping will be substantial.").

Qwest faces exactly this conundrum. As in *Abbott Laboratories*, the ordinances have "a direct effect on the day-to-day business" of telecommunications companies. There can be no question that Qwest is violating the ordinances — it owns and maintains facilities in the Cities' rights-of-way, and neither possesses nor has applied for a franchise. This is not a case like *Thomas*, where we held that a landlord's intent to violate a law was not enough. As we explained in *Thomas*, "[a]lthough we do not always require plaintiffs to await arrest or prosecution before entertaining a challenge to the constitutionality of a statute . . . the threat of enforcement must be at least 'credible,' not simply 'imaginary or speculative.' " *Thomas*, 220 F.3d at 1140 (citation omitted). *See also San Diego*, 98 F.3d at 1127 (distinguishing hypothetical violation from situation where party has "previously engaged in and would continue to engage in acts regulated under the challenged legislation" and where prosecution is under agency's control). Only an about-face by the Counterclaim Cities would save Qwest from civil or criminal penalties. Nothing about this situation makes Qwest's dilemma any less severe than that faced by Abbott Laboratories. Nor is Qwest's dilemma speculative or conjectural. *Abbott Laboratories* does not

require Damocles' sword to fall before we recognize the "realistic danger of sustaining a direct injury" that is the heart of the constitutional component of ripeness. *Babbitt*, 442 U.S. at 298.

[11] In sum, the enactment of these regulations "puts [Qwest] in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Lab.*, 387 U.S. at 152. The decision to comply will surely be costly, and "[t]he alternative to compliance . . . may be even more costly. That course would risk serious criminal and civil penalties. . . ." *Id.* at 153. This Hobson's Choice suggests the ripeness of the issue for review.[6]

2. Fitness of the Issues for Judicial Decision

[12] Under the test laid out in *Abbott Laboratories*, we must examine the fitness of the issues for review. If a controversy is "essentially legal in nature," *W. Oil & Gas Ass'n v. Sonoma County*, 905 F.2d 1287, 1291 (9th Cir. 1990), it is fit for judicial decision. This is the case when no "further factual amplification is necessary." *Id.*; *see also Abbott Lab.*, 387 U.S. at 149 (issue was ripe where parties agreed that it was purely legal).

[13] Qwest's counterclaim presents a pure question of law: Are the Counterclaim Cities' ordinances preempted by state or federal law? *See Int'l Truck Ass'n v. Henry*, 125 F.3d

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[6] The Counterclaim Cities also argue that Qwest does not have standing to challenge the ordinances. Standing, of course, overlaps substantially with ripeness. *Thomas*, 220 F.3d at 1138-39 (discussing similarity between standing and ripeness). In this case, the Counterclaim Cities' standing argument is inextricably linked with their ripeness challenge. Because we conclude that this case is ripe, we necessarily determine that Qwest — to whom the ordinances are directed—has standing to challenge the ordinances.

1305, 1309 (9th Cir. 1997) (stating that preemption is a matter of law). No further factual record would narrow or clarify that issue. As in *Abbott Laboratories*, there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity. Therefore, the controversy is essentially legal in nature.

Although we ordinarily "do[] not consider an issue not passed upon below," the decision to resolve a question "for the first time on appeal is one left primarily to the discretion of the courts of appeals." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). "[I]t is sometimes appropriate for an appellate court to pass on issues of law that the trial court did not consider." *Bibeau v. Pacific Northwest Research Foundation Inc.*, 188 F.3d 1105, 1111 n.5 (9th Cir. 1999).

In this case, we are faced with pure issues of law that were briefed extensively before the district court and again before the court of appeals. As such, there is a solid basis on which to consider the merits of the counterclaim.

3. Hardship to the Parties

[14] For the second, or "hardship," prong of *Abbott Laboratories* to favor the party seeking relief, "[p]ostponing review must impose a hardship on the complaining party that is *immediate*." *Anchorage v. United States*, 980 F.2d 1320, 1326 (9th Cir. 1992). Qwest contends that the hardship in this case is the costly and cumbersome requirement to apply for and comply with a franchise, as the failure to do so exposes it to civil and criminal penalties. We agree that the franchise ordinances impose multiple obligations upon Qwest. For example, Qwest is required to pay an application fee of up to $5000; file an application containing detailed information unrelated to the rights-of-way; negotiate certain terms of the franchise with the cities;

undergo extensive reporting and approval processes for transfers of ownership, including stock; provide excess capacity; and offer the cities favorable rates. Were we to decline to hear the case on grounds of ripeness, Qwest would be forced to obtain a franchise and then return to court to argue that state and federal laws preempt the city ordinances — exactly the same argument that it makes here. This was precisely the situation in *Abbott Laboratories*, which the Supreme Court found ripe for review: "Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance," the case is justiciable. 387 U.S. at 153.

[15] Having determined that this case is ripe, we proceed to consider the preemption claims on the merits.

B. PREEMPTION BY STATE LAW

Qwest argues that the local ordinances are preempted by state law, and further contends that it is exempted from any municipal franchise requirement by virtue of its statewide constitutional franchise.[7] The Counterclaim Cities counter that Washington's public utility laws do not preempt their management of municipal rights-of-way.

[16] WASH. CONST. art. XI, § 11 requires that a local law yield to a state statute on the same subject matter if that statute "preempts the field, leaving no room for concurrent

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[7] Qwest claims that its corporate predecessor possessed a grant dating to territorial times, giving it the right tc be present in the right of way. That grant, Qwest explains, was preserved in the territorial laws and was guaranteed into statehood by the Washington Constitution, and therefore exists independent of and immune from additional restrictions.

jurisdiction," or "if a conflict exists such that the two cannot be harmonized." *Brown v. City of Yakima*, 807 P.2d 353, 354 (Wash. 1991). *See also Employco Personnel Servs., Inc. v. City of Seattle*, 817 P.2d 1373 (Wash. 1991) (invalidating ordinance conflicting with state law).

Four days after Qwest filed its opening brief in this case, the Washington legislature enacted ESSB 6676, codified at RCW § 35.99.010 et seq. That law significantly altered the ability of municipalities to regulate telecommunications utilities, especially wireline facilities of those who hold statewide grants or franchises.

The new law establishes a system by which cities may grant "master permits," or franchises, to telecommunications companies. The scope of the master permits is described in some detail, and limited in several ways. Importantly, ESSB 6676 excludes from its scope "a service provider *asserting an existing state-wide grant* based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington Constitution to occupy the right of way." RCW § 35.99.010(3) (defining "master permit") (emphasis added); *see also* RCW § 35.99.030 ("[a] city or town may request, but not require, that a service provider with an existing state-wide grant to occupy the right of way obtain a master permit [i.e., franchise] for wireline facilities"). In addition, ESSB 6676 bars municipalities from adopting franchise systems that "regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law." RCW § 35.99.040(1)(a). Each of these provisions affects the present case.

[17] First, as noted above, ESSB 6676 specifically exempts companies asserting a state-wide grant from any requirement to obtain a municipal franchise for wireline

facilities. At oral argument, both parties agreed that Qwest asserts such a state-wide grant. Because ESSB 6676 exempts a company asserting a statewide constitutional grant from municipal franchises, the relief sought in Qwest's counterclaim — so far as it deals with wireline facilities — has been granted by statute.

[18] The ordinances' regulation of Qwest's wireline facilities clearly conflicts with RCW §§ 35.99.010(3) and 35.99.030. We therefore hold that ESSB 6676 preempts the franchise ordinances insofar as they purport to require a telecommunications company asserting a statewide constitutional grant to obtain a franchise for its wireline facilities.[8]

Having addressed wireline facilities, we are still faced with the issue of preemption with respect to wireless facilities. The remainder of the state and municipal franchise scheme is not so simple to resolve, in part because of the recent nature of ESSB 6676. The new law's prohibition on ordinances that "regulate the services or business operations of the service provider," RCW § 35.99.030(1)(a), could be interpreted to preempt ordinances that, for instance, require excess capacity or control stock transfers. In addition, some provisions of the ordinances might be preempted by state statutes regulating in the same subject area.[9] Further, the new law incorporates certain

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[8] Because ESSB 6676 grants Qwest a portion of the relief it seeks in its counterclaim, that portion of the counterclaim might also be considered moot. *See Kremens v. Bartley*, 431 U.S. 119, 129 (1977) (holding that a new statute resolving the dispute moots a claim). Whether characterized as preemption or mootness, the result is the same. The new law supersedes Qwest's claim.

[9] For example, the state regulates issuance of stock and securities at RCW § 80.08.030; rates, fees, and capacity at § 80.36.080; rates and service § 80.36.130; and franchise fees and charges at § 35.21.860.

requirements of the Telecom Act by limiting the authority of cities and towns to regulate the placement of facilities if the regulation "[v]iolate[s] section 253 of the Telecommunications Act of 1996." RCW § 35.99.040(2)(c). Any analysis of state preemption, then, requires us to look to federal law.

For these reasons, we decline to interpret as a matter of first impression the interplay between prior state laws and ESSB 6676, as applied to the Counterclaim Cities' ordinances regulating Qwest's wireless facilities. No Washington court has published an opinion involving any aspect of the new law; neither the WUTC nor the Washington State Attorney General has published any guidance as to its meaning or scope. Because we believe that a state court is better equipped to first interpret ESSB 6676 and its relationship with other state laws, and because the federal preemption issue is placed squarely before us by the new state law, we choose not to resolve the issue of whether other aspects of Washington state law preempts the ordinances' regulation of wireless facilities.

C. PREEMPTION BY FEDERAL LAW

Qwest also argues that the Telecom Act preempts the ordinances, a claim that the district court dismissed as unripe. The question before the district court and on appeal is whether, on the facts alleged, Qwest is entitled to judgment as a matter of law. *See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997). We conclude that it is.

[19] The Supremacy Clause, U.S. CONST. art. VI, cl. 2, invalidates state laws that "interfere with, or are contrary to," federal law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Within constitutional limits, Congress is empowered

to preempt state law in several ways, including by expressly stating its intention to do so. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). In this case, there can be no doubt that the Act preempts expressly; it states that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). The question for the court, then, is whether the ordinances "interfere with, or are contrary to" the Act. *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985).

1. Section 253(a) — Regulations Prohibiting or Having the Effect of Prohibiting Service

[20] Section 253(a) bars all state and local regulations that "prohibit or have the effect of prohibiting" any company's ability to provide telecommunications services unless the regulations fall within the statute's "safe harbor" provisions (of which only § 253(c), related to local regulation of rights-of-way, is relevant here). The preemption is virtually absolute and its purpose is clear — certain aspects of telecommunications regulation are uniquely the province of the federal government and Congress has narrowly circumscribed the role of state and local governments in this arena. "Municipalities therefore have a very limited and proscribed role in the regulation of telecommunications." *AT&T Communications v. City of Dallas*, 8 F. Supp. 2d 582, 591 (N.D. Tex. 1998).

[21] Section 253(a) preempts "regulations that not only 'prohibit' outright the ability of any entity to provide telecommunications services, but also those that 'may . . . have the effect of prohibiting' the provision of such services." *Bell Atl. v. Prince George's County*, 49 F. Supp. 2d

805, 814 (D. Md. 1999), *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2000). A number of courts have held that certain requirements imposed by local ordinances constitute a prohibition within the meaning of § 253(a). For example, an onerous application process, *Bell Atl.*, 49 F. Supp. 2d at 814 ("[A]ny 'process for entry' that imposes burdensome requirements on telecommunications companies and vests significant discretion in local governmental decisionmakers to grant or deny permission to use the public rights-of-way 'may . . . have the effect of prohibiting' the provision of telecommunications services in violation of the [Act]."); a requirement to obtain a franchise, *see AT&T Communications v. City of Dallas*, 52 F. Supp. 2d 763, 770 (N.D. Tex. 1999) (a representation by the city that "without a new franchise . . . AT&T may not offer [services]" is "sufficient proof of the requisite prohibitive effect that triggers the preemptive force of § 253(a)."), vacated and remanded on other grounds, ___ F.3d ___, 2001 WL 197926 (5th Cir. Mar. 15, 2001); threat of penalties for failure to obtain a franchise, *AT&T Communications v. City of Austin*, 975 F.Supp. 928, 939 (W.D. Tex. 1997) ("The threat of criminal sanctions and fines for the failure of an entity to obtain municipal consent can indubitably only be described as a prohibition."); or a combination of these factors, *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000) (regulations coupled with long approval process are a prohibition), may constitute a prohibitive effect. Taken together, these cases persuasively indicate that a regulatory structure that allows a city to bar a telecommunications provider from operating in the city "prohibit[s] or ha[s] the effect of prohibiting" the company's ability to provide telecommunications services under 47 U.S.C. § 253(a).

The ordinances at issue in the present case include several features that, in combination, have the effect of

prohibiting the provision of telecommunications services. In order to obtain a franchise, telecommunications companies must submit a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items, and "[s]uch other and further information as may be requested by the City." AUBURN MUN. CODE § 20.06.020(J). After application, two of the cities (Auburn and Olympia) require a public hearing before granting or revoking a franchise. Each of the franchise systems authorizes the Cities to consider discretionary factors that have nothing to do with the management or use of the right-of-way. The ordinances all regulate transferability of ownership, even requiring franchises to report to stock sales. Some non-tax fees charged under the franchise agreements are not based on the costs of maintaining the right of way, as required under the Telecom Act.[10] And, the ultimate cudgel is that each city reserves discretion to grant, deny, or revoke the franchises and the Cities may revoke the franchise if the terms in the ordinance are not followed, even allowing the Cities to remove the company's facilities. Civil and criminal penalties are authorized as well.

[22] Taken together, these requirements 'have the effect of prohibiting' Qwest and other companies from providing telecommunications services, see *City of Dallas*, 52 F. Supp. 2d at 770, and create a substantial and unlawful barrier to entry into and participation in the Counterclaim Cities' telecommunications markets. Nearly identical city or county franchise structures have been found to constitute prohibitions under § 253(a). *See, e.g., Bell Atl.*, 49 F. Supp. 2d at 816; *City of Dallas*, 52 F. Supp. 2d at 770; *Bellsouth*

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[10] The parties agree that Washington law allows for a six percent gross receipts tax.

Communications v. City of Coral Springs, 42 F. Supp. 2d 1304 (S.D. Fla. 1999).[11]

2. Section 253(c) — Management of Public Rights-of-Way

[23] Of course, a franchise requirement per se is not pre-empted by the Telecom Act. Only regulations that do not fall within a safe harbor provision, such as § 253(c), are pre-empted. As noted above, § 253(c) permits local regulations that "manage the public rights-of-way" and "require fair and reasonable compensation" for the "use" thereof. The Counter-claim Cities argue that each of the contested ordinances has a specific purpose that is related to the cities' ability to evaluate, permit, and manage telecommunications facilities in the rights-of-way.

[24] The Telecom Act does not define "manage[ment of] the public rights-of-way," but we are not completely without guidance. A number of federal courts have relied upon the Federal Communications Commission ("FCC"), the agency charged with interpreting and enforcing the Act, for interpretive assistance. *See, e.g., TCG New York*, 125 F. Supp. 2d at 90; *PECO v. Township of Haverford*, 1999 WL 1240941 (E.D. Pa. Dec. 20, 1999); *Bellsouth Communications v. Town of Palm Beach*, 127 F. Supp. 2d 1348, 1352-53 (S.D. Fla. 1999); *City of Coral Springs*, 42 F. Supp. 2d at 1308; *Bell Atl.*, 49 F. Supp. 2d at 815; *City of Dallas*, 8 F. Supp. 2d at 591-92.

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[11] The Sixth Circuit noted that a regulation that allows denial of a franchise does not alone constitute a prohibition within the meaning of § 253(a). *See TCG Detroit v. City of Dearborn*, 206 F.3d 618, 624 (6thCir. 2000) (holding that a fee requirement is not preempted by § 253(a)). As in *City of Austin*, 975 F. Supp. at 939, our conclusion is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone. *See TCG Detroit*, 206 F.3d at 624 (citing *City of Austin* with approval).

As the FCC has explained, right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way:

> [S]ection 253(c) preserves the authority of state and local governments to manage public rights-of-way. Local governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way . . . . [T]he types of activities that fall within the sphere of appropriate rights-of-way management . . . include coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.

In re TCI Cablevision of Oakland County, Inc., 12 F.C.C.R. 21396 (F.C.C. 1997), ¶ 103. The FCC, in turn, has looked to the legislative history for additional examples of right-of-way management. Senator Dianne Feinstein, during the floor debate on § 253(c), offered examples of the types of restrictions that Congress intended to permit under section 253(c), including requirements that:

> (1) "regulate the time or location of excavation to preserve effective traffic flow, prevent hazardous road conditions, or minimize notice impacts;" (2) "require a company to place its facilities underground, rather than overhead, consistent with the

> requirements imposed on other utility companies;" (3) "require a company to pay fees to recover an appropriate share of the increased street repair and paving costs that result from repeated excavation;" (4) "enforce local zoning regulations;" and (5) "require a company to indemnify the City against any claims of injury arising from the company's excavation."

In re Classic Telephone, Inc., 11 F.C.C.R. 13082 (F.C.C. 1996), ¶39 (quoting 141 Cong. Rec. S8172 (daily ed. June 12, 1995) (statement of Sen. Feinstein, quoting letter from the Office of City Attorney, City and County of San Francisco)).

[25] Applying these guidelines, coupled with common sense, it is apparent that the ordinances establish franchise systems that regulate the telecommunications companies themselves, not merely the rights-of-way. We focus on four significant features of the ordinances that violate § 253(c).

[26] First, the ordinances require Qwest to undergo an extensive application process that is not directly related to management of the public rights-of-way. As described above, companies must submit a lengthy and detailed application form. AUBURN MUN. CODE § 20.06.020(J). This application includes data gathered by the cities in order to determine the financial soundness, technical qualifications, and legal ability to provide telecommunications services;[12] a description of all services provided currently or in the future;[13] and unnamed discretionary factors that may have

[12] AUBURN MUN. CODE § 20.06.020 (C), (D), (G); DES MOINES MUN. CODE § 20.02.012(8); OLYMPIA MUN. CODE § 11.04.020(I); TACOMA MUN. CODE § 16.04.4.2.5.2, 16.04.4.2.9.

[13] AUBURN MUN. CODE § 20.06.020 (C); DES MOINES MUN. CODE § 20.02.012(4); OLYMPIA MUN. CODE § 11.04.020(B); TACOMA MUN. CODE § 16.04.4.2.4.

nothing to do with the management or use of the right-of-way.[14]

Regulations requiring "the applicant [to] submit proof of its financial, technical, and legal qualifications" do not regulate the public rights-of-way. *City of Palm Beach*, 127 F. Supp. 2d at 1355. *See also City of Dallas*, 8 F. Supp. 2d at 593 ("Dallas also does not have the power to require a comprehensive application and consider such factors as the company's technical and organizational qualifications to offer telecommunications services."); *City of Coral Springs*, 42 F. Supp. 2d at 1310 ("financial, technical and legal qualifications"); *TCG New York*, 125 F. Supp. 2d at 91. In addition, a description of telecommunications services to be provided does not directly relate to management of the rights-of-way. See *id.*; *City of Coral Springs*, 42 F. Supp. 2d at 1309 ("[T]he City does not have the authority to request information regarding systems, plans, or purposes of the telecommunications facilities."). The upshot of the application process is to regulate the provision of telecommunications services rather than to regulate the right-of-way.

[27] Second, the ordinances impose reporting requirements or other controls over matters not directly related to management of the rights-of-way. For example, the ordinances regulate ownership and certain transfers of shares of ownership of telecommunications companies, regardless of whether ownership affects the right-of-way.[15]

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[14] AUBURN MUN. CODE § 20.06.020 (J); DES MOINES MUN. CODE § 20.02.012(9); OLYMPIA MUN. CODE § 11.06.020(G); TACOMA MUN. CODE § 16.04.4.3.4.

[15] AUBURN MUN. CODE § 20.10.290 (50% control); DES MOINES MUN. CODE § 20.06.70 (5% control); OLYMPIA MUN. CODE § 11.10.290 (50% control); TACOMA MUN. CODE § 16.01.8.3.3 (transfer of franchise).

Although the Counterclaim Cities may wish to "have a right to know" who owns shares in the telecommunications companies that use the public rights-of-way, the municipal regulation of stock transfers extends far beyond management of the rights-of-way. Because these regulations are more than necessary to "man-age the rights-of-way," they do not fall within the safe harbor of section 253(c).

[28] Third, the ordinances require, either through the application process or by other means, that franchise agreements contain certain conditions unrelated to management of the rights-of-way. For example, three of the cities require that franchisees offer "most-favored-community" status — that is, the best available rates and terms.[16] These ordinances bear no relation to management of the rights-of-way, but focus solely on rates, terms and conditions of service. *See, e.g., TCG New York*, 125 F. Supp. 2d at 93 (holding that a most-favored clause "is more akin to a regulation of . . . rates, terms, and conditions of service unrelated to . . . use of the public rights-of-way"); *In re TCI Cablevision*, 12 F.C.C.R. 21396 at ¶ 105 (noting that "most favored nation" clauses are "difficult to justify under § 253(c) on the grounds that they are within the scope of permissible local rights-of-way management authority."). In addition, ordinance requirements that companies provide free or excess capacity[17] for the use of the cities or otherusers go beyond management of the rights-of-way. *See City of Dallas*, 8 F. Supp. 2d at 593 (such requirements are "totally unrelated to use of the city's rights-of-way, and are thus beyond the scope of the City's authority").

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[16] AUBURN MUN. CODE § 20.06.180(N); DES MOINES MUN. CODE § 20.01.10; OLYMPIA MUN. CODE § 11.10.370.

[17] AUBURN MUN. CODE § 20.10.470; DES MOINES MUN. CODE § 20.08.108; OLYMPIA MUN. CODE § 11.10.050(D); TACOMA MUN. CODE § 16.01.6.2.5.

[29] Fourth, and perhaps most problematic, the ordinances grant the Counterclaim Cities unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors.[18] This grant goes far beyond the limits of § 253(c), encompassing anything a city deems to be in the public interest. Like the other courts that have faced this question, we conclude that such ordinances are too vague and too broad to comply with § 253(c). *See, e.g.*, *TCG New York*, 125 F. Supp. 2d at 92; *City of Coral Springs*, 42 F. Supp. 2d at 1306; *Bell Atl.*, 49 F. Supp. 2d at 816 ("most objectionable is the fact that the ordinance vests the county with complete discretion to grant or deny a franchise application based on a wide-ranging set of factors that include 'whether the proposal will serve and protect the public interest.' "); *City of Dallas*, 8 F. Supp. 2d 582, 592-93 ("The City does not, however, have the authority to grant or deny that franchise based on its own discretion. Rather, granting a franchise may only be conditioned on a company's agreement to comply with the city's reasonable regulations of its rights-of-way and the fees for use of those rights-of-way.").

We have specifically discussed only those aspects of the ordinances that most seriously violate § 253(c), but others

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[18] AUBURN MUN. CODE § 20.06.040(M) ("such other factors as may demonstrate that the Franchise to use the public ways will serve the community interest."); DES MOINES MUN. CODE § 20.03.18 (same); OLYMPIA MUN. CODE § 11.04.030(J) (same); TACOMA MUN. CODE § 16.01.8.2.7 ("The City Council may, in its sole discretion which is hereby reserved, (1) approve or disapprove a License; and (2) require such terms and conditions in the License Agreement as deemed in the best interest of the City.").

are objectionable as well.[19] It is not enough to argue, as the Counterclaim Cities do, that the ordinances regulate *aspects* of telecommunications companies that are *related to their fitness to provide services*, and therefore use the rights-of-way. For example, they say stock ownership is linked to a company's financial well-being, which may affect its continued existence, or its ability to pay fees or other necessary costs, which may ultimately affect its use of the right-of-way. This argument has the flavor of the old children's ditty, "Oh, your ankle bone connected to your leg bone, your leg bone connected to your thigh bone, your thigh bone connected to your hip bone . . . ."[20] This is simply too tenuous a connection to the "manage[ment] of rights of way." Under this semantic two-step, § 253(c) would have no limiting principle. The safe harbor provisions would swallow whole the broad congressional preemption. Municipalities could regulate nearly any aspect of the telecommunications business. Indeed, these regulations come perilously close to this *reductio ad absurdum*.

[30] Under the Supremacy Clause, a local law "is nullified to the extent that it actually conflicts with federal law" by "stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillborough*, 471 U.S. at 713 (citation omitted).

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[19] For example, two cities' requirement for a public hearing before granting a franchise, see AUBURN MUN. CODE § 20.06.030, OLYMPIA MUN. CODE § 11.10.320; three cities' requirements for negotiations of the terms and discretionary acceptance of a franchise, see AUBURN MUN. CODE § 20.06.050, DES MOINES MUN. CODE § 20.02.19; OLYMPIA MUN. CODE § 11.04.050; and non-cost-based fees, see AUBURN MUN. CODE § 20.04.020, DES MOINES MUN. CODE § 20.09.112; OLYMPIA MUN. CODE § 11.04.020 (K) (authorizing council to set fee); TACOMA MUN. CODE § 16.01.5.3.1.

[20] DRY BONES (American spiritual derived from *Ezekiel* 37:1-14), *available at* http://www.hope.edu/bandstra/RTOT/CH12/BONES.HTM.

Because these elements of the ordinances are contrary to § 253 of the Telecom Act, they are preempted.

D. SEVERABILITY

To determine whether invalid portions of the ordinances are severable, we look to state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139 (1996) ("Severability is of course a mater of state law."). Under Washington law, the test for severability is whether

> the invalid provisions are unseverable and it cannot reasonably be believed that the legislature would have passed the one without the other . . . or, alternatively, whether the elimination of the unconstitutional portion so destroys the act as to render it incapable of accomplishing the legislative purposes.

State v. Anderson, 501 P.2d 184, 186 (Wash. 1972) (citation omitted). As the Counterclaim Cities note, a severability clause "offers to the courts the necessary assurance that the remaining provisions would have been enacted without the portions which are contrary to the constitution." *Id.* However, the existence of such a clause is not dispositive. Even with a severability clause, an ordinance must fall in its entirety when "the elimination of the [invalid] portion so destroys the act as to render it incapable of accomplishing the legislative purpose." *Guimont v. Clarke*, 854 P.2d 1, 16 (Wash. 1993) (quoting *Anderson*, 501 P.2d at 186).

[31] The Counterclaim Cities' ordinances contain a complex mix of application procedures, approval requirements, required franchise terms, financial and operations disclosure, and discretionary "catchall" clauses whose preempted provisions are so pervasive that it is not

practicable to conduct a line-by-line severability analysis of each city's municipal code. Were we to do so, the elimination of preempted sections of the codes would result in regulation requiring a disjointed franchise application, a lack of standards for approval, disapproval, or revocation by the cities, and cross-references leading the reader to non-existent provisions. As the district court held in *Bell Atlantic*, "given the number and variety of provisions of the [cities'] telecommunications franchise law[s] that are preempted by the [Act], . . . attempting to sever the invalid from the valid provisions would [not] be appropriate." *Bell Atl.*, 49 F. Supp. 2d. at 820-21 (applying Maryland Law).

This is not to say that the Counterclaim Cities cannot enact ordinances to manage the rights-of-way under § 253(c). But we cannot say that the objectionable portions of the present ordinances may be excised without rendering the end product a Swiss cheese regulation that would not be capable of "accomplishing the ordinances' legislative purposes." *Anderson*, 501 P.2d at 186.

CONCLUSION

We affirm the district court's order granting summary judgment for the Cities on their claim regarding relocation costs. We reverse the district court's order dismissing Qwest's counterclaim for lack of ripeness; we remand Qwest's counter-claim with regard to wireline facilities as preempted with instructions to grant judgment to Qwest because state law preempts the municipalities' ordinances with regard to wireline facilities. We remand Qwest's counterclaim with regard to wireless facilities with instructions to grant judgment to Qwest consistent with this opinion.

Affirmed in part and reversed in part and remanded with instructions. The parties shall each bear their own costs on appeal.

APPENDIX B

APPENDIX B

[Filed November 16, 1999]

UNITED STATES DISTRICT COURT,
W.D. WASHINGTON,
AT TACOMA

CITY OF AUBURN, et al., Plaintiffs,
v.
U S WEST COMMUNICATIONS, INC., Defendant.

Case No. C98-5595FDB

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, AND DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT AND MOTION ON THE PLEADINGS ON DEFENDANT'S COUNTERCLAIMS

Traditionally, whenever city improvements required the displacement of telecommunications equipment sited on the city's right of way, telecommunications companies bore the expense of relocating the equipment. However, on February 21, 1996, U S West notified cities and counties in the State of Washington that it would no longer bear these relocation costs, and announced that cities and counties would have to pay such costs in the future. This dispute is ongoing:

> For example, when the City of Vancouver directed U S West to move an aerial line to accommodate a City street project, U S West responded by demanding that the City agree to payment of $10,272.00 for the cost of relocating U S West facilities *before* work could be started. The letter accompanying the "Billing Proposal"

to the City of Vancouver stated:

> Attached are two copies of our Billing Proposal. We must receive both copies, signed at the acceptance paragraph, *before the work described on the USWC proposal can be started.*
>
> Declaration of William Whitcomb .... On May 19, the Senior Civil Engineer for the City directed U S West to proceed with the relocation of the facilities, noting that construction on the street project would begin within a few weeks and that it was "imperative that your facilities be relocated in advance of our construction." .
>
> U S West's conduct threatened to delay the street improvement project, and on June 2, the Senior Civil Engineer wrote again to U S West requesting confirmation of U S West's schedule.... Finally, after attorneys intervened, U S West agreed to proceed with the relocation, but continued to insist on charging the City.

Plaintiffs' Memo in Support of SJ at 3-4.

The plaintiffs, various cities in Western Washington, seek[1] a declaratory judgment that the defendant is still obliged to pay such relocation costs. U S West filed counterclaims as to a handful of the plaintiff cities,[2] which cities have recently passed ordinances seeking to regulate the telecommunications industry. The counterclaims would invalidate these ordinances.

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[1] While originally filed in state court, the defendant removed this action to the federal court on the basis of diversity jurisdiction.

[2] Auburn, Olympia, Tacoma, Des Moines and University Place.

There are a number of motions pending in this matter. The defendant, U S West, has moved for summary judgment of dismissal. The plaintiffs, various cities of Western Washington, likewise move for summary judgment. Further, U S West has moved for Judgment on the Pleadings on its counterclaims; the cities which are subject to the counterclaims have moved for partial summary judgment on the counter claims.

I. CROSS-MOTIONS FOR SUMMARY JUDGMENT

Summary Judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.[3] *Retail Clerks Union Local 648, AFL-CIO v. Hub Pharmacy, Inc.*, 707 F.2d 1030, 1033 (9th Cir.1983). The opposing party "may not rest on conclusory allegations, but must set forth specific facts showing that there is a genuine issue for trial." *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir.1986); *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 876 (9th Cir.1987). "One of the primary purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses ...." *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

The plaintiffs point out that

> [t]he general rule is hornbook law: "A telegraph or telephone company is bound to make such changes as public convenience and necessity require *at its*

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[3] "The moving party is 'entitled to judgment as a matter of law' [when] the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552-53 (1986).

own expense." 86 C.J.S. Telecommunications § 49 (emphasis added).

Plaintiffs' Opposition to U S West's Motion for Summary J. at 7.

> [I]t is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when that state might require for a necessary public use that changes in location be made.

New Orleans Gaslight Co. v. Drainage Com. of New Orleans, 197 U.S. 453, 25 S.Ct. 471, 473, 49 L.Ed. 831 (1905) (holding that requiring the utility to relocate its pipes at its own expense did not constitute a legal injury).

Washington law is consistent:

> The company's other contention is that it is entitled to 'damages' from the city to the extent of the expense incurred in re-laying its pipes when necessitated by changes in street grades made upon the authority of the city.
>
> The principle of *damnum absque injuria* is an ancient one. It is applicable here. The city is not guilty of any tort; no wrongful act is being done. The necessity and convenience of the public is being served. No property

> is taken; no title is disturbed. The authorities are well-nigh unanimous that in such a case the city has a paramount right to serve the public necessity and convenience without payment for individual losses therefrom. Many roadside businesses have been destroyed by the rerouting of traffic or changes in the location of streets and highways.
>
> The paramount right of the city, in such case as this, precludes the availability of any remedy to the company. *Damnum absque injuria.*

Western Gas Co. v. Bremerton, 21 Wash.2d 907, 909, 153 P.2d 846 (1944).

A. Pre-Statehood Grant

U S West contends first that it is subject to a historical grant, characterized as a "constitutional contract" (Defendant's Memo in Support of SJ to Dismiss at 4), stemming from its providing telecommunication services prior to statehood. The drafters of the Washington Constitution recognized the important role of telecommunications: the Washington Constitution, Article XII, § 19, provides that

> Any association or corporation ... shall have the right to construct and maintain lines of telegraph and telephone within this state .... The legislature shall, by general law of uniform operation provide reasonable regulations to give effect to this section.

Pursuant to this provision, the Washington legislature, in its first session, passed an act pertaining to telephone and telegraph companies, now codified as RCW 80.36.040:

> Any telecommunications company ... doing business in this state, shall have the right to construct and maintain all necessary lines of telegraph or telephone for public traffic along and upon any public road, street or highway, ... and may erect poles, posts, piers or abutments for supporting the insulators, wires and any other necessary fixture of the lines, in such manner and at such points as not to incommode the public use of the ... highway.

However, I cannot agree that this recognition of a right to erect and maintain telecommunications equipment along the public right of way cedes any unstated rights or creates an exception to the general rule; I do not see that there is a "constitutional contract" which overcomes the general rule that utilities should bear the expense of relocation of their equipment when required for the convenience of the public. The plaintiffs correctly note that even prior to statehood, the federal Post Roads Act required telegraph companies to maintain their lines so as "not to obstruct ... or interfere with the ordinary travel on such military or post roads." U.S.Rev.Stats. § 5263 (14 Stat. 221). The territorial legislature similarly provided that the right to construct telegraph lines was subject to the requirement that such lines "not unnecessarily obstruct[ ]" roads, streets, highways, etc. Territory of Washington, Private and Local Laws, Thirteenth Session 1866. The Washington Constitution, Article XII, § 19, itself provided for "reasonable regulations", and the first legislature recognized the right to erect telecommunications equipment only "in such manner and at such points as not to incommode the public use of the ... highway." Session Laws, 1889-90, Rem.Rev.Stat. § 11352.

B. TARIFF

As a public utility, U S West is extensively regulated by the state. U S West's rates, services, facilities and practices are under the regulation of the Washington Utilities and Transportation Commission ("WUTC"). RCW 80.01.040(3). U S West is required to file with the WUTC a tariff, a schedule of rates and services. RCW 80.36.100. The WUTC may order changes. A tariff which is not changed by the WUTC becomes effective thirty days after filing, RCW 80.36.110, and has "the force and effect of law." *General Telephone Co. v. Bothell,* 105 Wash.2d 579, 585, 716 P.2d 879 (1986).

Since 1968, U S West (or its direct predecessor) has filed tariffs with the WUTC which apportioned relocation expenses. The current tariff (WN U-31) states:

> When relocation or aerial to underground conversion of existing facilities is requested or required by law, the cost of constructing the new or removing the old facilities will be borne by the customer or others requesting the relocation or conversion.

Defendant's Memo in Support of SJ at 4. U S West argues that this provision shifting the expense of relocation to "others requesting the relocation" applies to cities, and that the tariff, having the "force and effect of law", trumps the general rule requiring utilities to bear expenses for relocation.

There is some degree of merit to the plaintiffs' argument that "[c]ities--not the WUTC--regulate U S West's use of City streets and rights-of- way." Plaintiffs' Opposition to Motion for SJ at 10. To say that a well-recognized

legal principle, like the allocation of expenses to utilities for the cost of equipment relocation in public right of way, may be abrogated by the general tariff enunciation that relocation expenses would be borne "by others" requesting relocation, would be to render state law unduly precarious.[4] The reasoning of the Colorado Supreme Court in *U S West v. City of Longmont*, 948 P.2d 509 (Colo.1997)(*en banc*) (holding that a pre-existing tariff did not preempt municipal ordinance requiring "undergrounding" of utility lines) is persuasive.

U S West relies heavily upon *General Telephone v. Bothell*, 105 Wash.2d 579, 716 P.2d 879 (1986). *Bothell* may be distinguished; I agree with the plaintiffs that the issue of tariff preemption of the state common law was not squarely before the Washington Supreme Court in *Bothell*. In light of the larger body of state law pertaining to the "paramount right" of cities to act to protect public necessity and convenience (*Western Gas Co. v. Bremerton, supra; State v. Public Utility Dist. No. 1*, 55 Wash.2d 645, 349 P.2d 426 (1960)), I must agree that Tariff WN U-31 does not preempt the cities' right to require the defendant to pay for relocation of equipment on the public right of way.

II. COUNTERCLAIMS

Following the passage of the Federal Telecommunications Act of 1996 ("FTA"), the Cities of Auburn, Olympia, Tacoma, Des Moines and University Place passed various ordinances governing the telecommunications companies.

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[4] I might further note that the recent decision in *Pierce County v. U S West Communications*, Pierce County Superior Court Cause No. 97-2-08395-3, clearly concluded that a WUTC tariff did not overcome preexisting state statute regarding the right of counties to shift the cost of equipment relocation to telecommunications companies.

The defendant filed counterclaims against these cities, contending that these ordinances violated the FTA, and were preempted. These "Counterclaim Cities" filed two motions for partial summary judgment on the counterclaims; the "Motion for Partial Summary Judgment on Counterclaim Re: Municipal Regulation of Rights of Way", and the "Motion for Partial Summary Judgment on Counterclaim Re: Undergrounding Ordinances". At around the same time, the defendant moved for judgment on the pleadings as to its counterclaims.

I have been unable to detect a ripe dispute as to the counterclaims. The defendant has not demonstrated that any of the Counterclaim Cities have attempted to enforce their ordinances against it. I am unaware, for example, that any city has instructed the defendant that it must remove its equipment for failure to file a franchise application. Regardless of the persuasiveness of the defendant's argument, *see Bell Atlantic-Maryland v. Prince George's County*, 49 F.Supp.2d 805 (D.Md.1999), I decline to broadly review these ordinances for the purpose of determining (a) which particular provision of which ordinance offends the FTA, and (b) whether the entire ordinance needs to be invalidated despite the ordinances' severability clauses. That analysis would be better conducted following specific attempts by the Counterclaim Cities to enforce their telecommunications ordinances.

I should note that the City of University Place amended its telecommunications ordinance, and has moved to have the counterclaims against it dismissed on the basis of mootness. The defendant agreed at oral argument that it did not oppose this request.

It is hereby

ORDERED:

(1) That the plaintiffs' Motion for Summary Judgment is GRANTED;

(2) That the defendant's Cross-Motion for Summary Judgment of Dismissal is DENIED;

(3) That the plaintiffs' Motions for Partial Summary Judgment to Undergrounding and Municipal Regulation of Rights of Way are DENIED as unripe;

(4) That the defendant's Motion for Judgment on the Pleadings on the Counterclaims is DENIED as unripe; and

(5) That the request of the City of University Place for dismissal of the defendant's counterclaims against it on the basis of mootness is GRANTED.

Dated this 15 day of November, 1999

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
United States District Court Judge

APPENDIX C

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12. Defenses and Objections – When and How Presented – By Pleading or Motion – Motion for Judgment on Pleadings.

(c) Motion for Judgment on the Pleadings.
After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

APPENDIX D

APPENDIX D

TITLE 16

Telecommunications Systems, Cable Systems, and Private Communication Systems

TITLE 16

TELECOMMUNICATION SYSTEMS, CABLE SYSTEMS, AND PRIVATE COMMUNICATION SYSTEMS

Chapters:

16.01 General

16.02 Special Rules Applicable to Telecommunications Facilities and Telecommunications Service Providers

16.03 Special Rules Applicable to Open Video Systems

16.04 Special Rules Applicable to Cable Television Systems

16.05 Private Communications Facilities

16.06 Miscellaneous

Chapter 16.01

GENERAL

Sections:

16.01.1 Purpose.

16.01.2 Policy guidelines.

16.01.3 Definitions.

16.01.3.1	Generally
16.01.3.2	Affiliate
16.01.3.3	Application Fee
16.01.3.4	Cable Service
16.01.3.5	Cable System
16.01.3.6	City
16.01.3.7	City Manager
16.01.3.8	Communications Facility
16.01.3.9	Communications System
16.01.3.10	Construction, Operation or Repair
16.01.3.11	Franchise
16.01.3.12	Franchise Area
16.01.3.13	Franchisee
16.01.3.14	FCC
16.01.3.15	Gross Revenues
16.01.3.16	License
16.01.3.17	Open Video System, or "OVS"
16.01.3.18	Operator
16.01.3.19	Overhead Facilities
16.01.3.20	Person
16.01.3.21	Private Communications System
16.01.3.22	Private Communications System Owner
16.01.3.23	Programmer
16.01.3.24	Public Rights-of-Way
16.01.3.25	Reseller

16.01.3.26 Telecommunications Service
16.01.3.27 Telecommunications System
16.01.3.28 Title
16.01.3.29 Transfer
16.01.3.30 Underground Facilities

16.01.4 Franchise required.
16.01.4.1 Purpose and characteristics
16.01.4.2 Franchise requirement
16.01.4.3 Exceptions
16.01.4.4 Nature of grant

16.01.5 Cost Recovery.
16.01.5.1 Purpose
16.01.5.2 Compensation for use
16.01.5.3 Payments required
16.01.5.4 Payment of Costs
16.01.5.5 Exceptions
16.01.5.6 Billable work order
16.01.5.7 Application to persons that provide different types of services
16.01.5.8 General rules for payment of fees and assessments

16.01.6 General conditions upon use of public rights-of-way.
16.01.6.1 Responsibility for costs
16.01.6.2 Construction procedures and placement of facilities; obligations to minimize interference with use of public rights-of-way
16.01.6.3 Relocation of facilities
16.01.6.4 Facility subject to inspection; operator must provide information
16.01.6.5 Plans for and publicizing work

16.01.7 Protection of the City and residents.

16.01.7.1 Indemnification
16.01.7.2 Insurance
16.01.7.3 Performance/payment bonds
16.01.7.4 Security fund

16.01.8 Enforcement and remedies.
16.01.8.1 City Manager responsible for administration
16.01.8.2 Applications for Franchises and Licenses
16.01.8.3 Minimum contents of every franchise or License
16.01.8.4 Penalties
16.01.8.5 Revocation, reduction of term, or forfeiture of franchise or license
16.01.8.6 Effect of termination or forfeiture
16.01.8.7 Remedies Cumulative
16.01.8.8 Access to books and records
16.01.8.9 Retention of records; relation to privacy rights
16.01.8.10 Reports
16.01.8.11 Maps
16.01.8.12 Compliance with laws
16.01.8.13 Reservation of authority
16.01.8.14 No waiver
16.01.8.15 Title not a contract

16.01.9 Transitional provisions.
16.01.9.1 Persons operating without a franchise or license
16.01.9.2 Persons holding Franchises or licenses
16.01.9.3 Persons holding leases for property in the right-of-way
16.01.9.4 Persons with pending applications
16.01.9.5 Transitional rules to be narrowly interpreted

16.01.10 Special rules for government entities.

16.01.11 No waiver.

16.01.1 Purpose.

The purpose of this title is to:

16.01.1.1 Establish a local policy concerning telecommunications systems, cable systems, open video systems, and private communication systems that use the public rights-of-way;

16.01.1.2 Establish a policy that promotes availability of high-quality and diverse telecommunications services to City residents, businesses, the City, and other public institutions; promotes the availability of diverse, multimedia information resources to the community; provides for the development of a communications infrastructure that provides opportunities for more open government, enhancing educational opportunities throughout the community, providing public access to the communications infrastructure, and building a stronger community; while ensuring that the City has the authority to act to protect the public, safety, and welfare in the face of a rapidly-changing industry that is placing increasing demand on public resources;

16.01.1.3 Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of the use of public rights-of-way by telecommunications operators, cable operators, open video system operators, private communication operators, and Resellers, and their respective facilities and licenses;

16.01.1.4 Promote competition in communications;

16.01.1.5 Minimize unnecessary local regulation of providers and services;

16.01.1.6 Encourage the provision of advanced and competitive telecommunications, cable or open video system services on the widest possible basis to the businesses, institutions and residents of the City;

16.01.1.7 Permit and manage reasonable access to the public rights-of-way of the City for communications purposes on a competitively neutral basis;

16.01.1.8 Conserve the limited physical capacity of the public rights-of-way held in public trust by the City;

16.01.1.9 Assure that the City's current and ongoing costs of granting and regulating private access to and use of the public rights-of-way are fully paid by the persons seeking such access and causing such costs;

16.01.1.10 Secure fair and reasonable compensation to the City and the residents of the City, in a non-discriminatory manner, for permitting private use of the public rights-of-way;

16.01.1.11 To encourage economic development while preserving aesthetic and other community values and preventing proliferation of above-ground facilities;

16.01.1.12 Assure that all persons providing telecommunications, cable, or open video facilities or services within the City comply with the ordinances, rules and regulations of the City;

16.01.1.13 Ensure the ability of the City to obtain sufficient information from persons subject to its jurisdiction to enable effective decisions regarding their access to City rights-of-way and effective management of activity in the rights-of-way;

16.01.1.14 Assure that the City can continue to fairly and responsibly protect the public health, safety and welfare; and

16.01.1.15 Enable the City to discharge its public trust consistent with rapidly evolving Federal and State regulatory policies, industry competition and technological development. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.2 Policy guidelines.

The administration of this title shall be governed by the following telecommunications and video programming policy guidelines:

The City of Tacoma supports efforts to establish an open, competitive marketplace for telecommunications and video programming services. The City promotes and encourages competition for voice, data, video, and video programming services that make the latest and best technology available and keep service prices affordable for all City residents and businesses. An integral component of this open marketplace is the consistent application of regulations to all telecommunications and video programming providers and the preservation of local authority over matters of local impact.

The following policy guidelines express the commitment of the City to support telecommunications and video programming services and to manage its rights-of-way proactively while balancing the interests and needs of the community:

1. The City will manage access to the public rights-of-way for telecommunications purposes in a non-discriminatory, competitively neutral and non-exclusive way to the extent required under applicable law and, to the extent allowed under applicable law, to receive fair compensation. The City will also manage access to its public rights-of-way for video programming purposes in a non-discriminatory,

competitively neutral and non-exclusive way to the extent required by applicable law and, to the extent allowed by applicable law, to receive fair compensation.

- The public interest will be protected by collecting full and fair market compensation, associated fees, taxes, administrative costs, and construction costs for use of the rights-of-way.

2. Telecommunications and video programming franchises will be managed to preserve the integrity of the City's infrastructure, ensure efficient use of City property and ensure compliance with City ordinances, rules and regulations.

- Minimal disruption of public property will be ensured.

- Telecommunications and video programming franchisees will be required to place their facilities underground in situations where existing utility services are underground and/or whenever existing overhead facilities go underground and/or whenever City policy so requires.

3. Investments by telecommunications and video programming providers will be encouraged in order to enhance economic development programs and provide jobs, opportunities, and choices for its citizens.

- Public and private partnerships are encouraged to meet public service needs and to actively pursue State, Federal, and private grant funding that offers public benefit in advanced telecommunications.

4. Universal access to telecommunications and video programming services is encouraged for all residents and businesses. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.030 Definitions.

16.01.3.1 Generally

16.01.3.2 Affiliate
16.01.3.3 Application Fee
16.01.3.4 Cable Service
16.01.3.5 Cable System
16.01.3.6 City
16.01.3.7 City Manager
16.01.3.8 Communications Facility
16.01.3.9 Communications System
16.01.3.10 Construction, Operation or Repair
16.01.3.11 Franchise
16.01.3.12 Franchise Area
16.01.3.13 Franchisee
16.01.3.14 FCC
16.01.3.15 Gross Revenues
16.01.3.16 License
16.01.3.17 Open Video System, or "OVS"
16.01.3.18 Operator
16.01.3.19 Overhead Facilities
16.01.3.20 Person
16.01.3.21 Private Communications System
16.01.3.22 Private Communications System Owner
16.01.3.23 Programmer
16.01.3.24 Public Rights-of-Way
16.01.3.25 Reseller
16.01.3.26 Telecommunications Service
16.01.3.27 Telecommunications System
16.01.3.28 Title
16.01.3.29 Transfer
16.01.3.30 Underground Facilities

16.01.3.1 "Generally." For the purposes of this title, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number; and words in the singular number include the plural number; and the

masculine gender includes the feminine gender. The words "shall" and "will" are mandatory, and "may" is permissive. Unless otherwise expressly stated, words not defined in this title shall be construed consistent with Title 47 of the United States Code, and, if not defined therein, their common and ordinary meaning. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

6.01.3.2 "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.

16.01.3.3 "Application Fee" means the charge specified in Sections 16.01.5.3.1 and designed to recover the City's actual costs in processing applications for franchises or licenses, including applications for the transfer thereof.

16.01.3.4 "Cable service" means"

(A) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

16.01.3.5 "Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple

subscribers within a community, but such term does not include:

(A) A facility that serves only to retransmit the television signals of one or more television broadcast stations;

(B) A facility that serves subscribers without using any public right-of-way;

(C) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II (Common Carriers) of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

(D) Any facilities of any electric utility used solely for operating its electric utility systems; or

(E) An open video system that is certified by the FCC.
A reference to a cable system includes pedestals, equipment enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the cable system.

16.01.3.6 "City" means the City of Tacoma and all departments, divisions, and agencies thereof, including the Department of Public Utilities.

16.01.3.7 "City Manager" means the City Manager or the City Manager's designee.

16.01.3.8 "Communications facility" means a device which alone or as part of an aggregation of devices is capable of transmitting signals from place to place.

16.01.3.9 "Communications system" refers to a telecommunications system, cable system, or open video system.

16.01.3.10 "Construction, operation or repair" and similar formulations of that term means the named actions interpreted broadly, encompassing, among other things, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, and excavation.

16.01.3.11 "Franchise" refers to the authorization granted by the City to an operator of a telecommunications system, cable system, or an open video system under this title giving the operator the non-exclusive right to occupy the space, or use facilities upon, across, beneath, or over any public right-of-way in the city, to provide a specified service within a franchise area. Any franchise shall be issued in the form of an ordinance, and must be accepted by the franchisee to become effective in the time and manner specified in the City Charter, Tacoma Municipal Code, or the franchise ordinance. Such franchise shall not include or be a substitute for:

(i) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City;

(ii) Any permit, agreement or authorization required in connection with operations on or in public streets or property, including by way of example and not limitation, street cut permits;

(iii) Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the franchise including, without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the City, including the Department of Public Utilities, or a private entity; or

(iv) The right to place devices in the right-of-way, such as pay telephones, for end user use in terminating or originating transmissions.

By way of example, and without limiting the foregoing, this title shall not be read to diminish or in any way affect the authority of the Department of Utilities to control and charge for the use of the Light, Water, and Belt Line Divisions' real estate, fixtures or personal property. Therefore, any person who desires to use such property must obtain additional approvals, franchises, or agreements for that purpose, as may be required by the City.

16.01.3.12 "Franchise area" means the area of the City that a franchisee is authorized to serve by the terms of its franchise or by operation of law.

16.01.3.13 "Franchisee" refers to a person holding a franchise granted by City ordinance.

16.01.3.14 "FCC" means the Federal Communications Commission or its successor.

16.01.3.15 "Gross Revenues" means any and all revenue, of any kind, nature or form, as more particularly defined under the succeeding chapters in this title.

16.01.3.16 "License" refers to the legal authorization, terminable at will, to use a particular, discrete, and limited portion of the public rights-of-way to construct, operate, or repair a Communications Facility or a Private Communications System. The term license shall not mean or include:

(i) Any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City;

(ii) Any permit, agreement, or authorization required in connection with operations on public streets or property,

including by way of example and not limitation, street cut permits;

(iii) Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the license including, without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the City, including the Department of Public Utilities, or a private entity; or (iv) the right to place devices in the right-of-way, such as pay telephones, for end-user use in originating and terminating transmissions.

16.01.3.17 "Open Video System" or "OVS" refers to a facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service, which includes video programming, which is provided to multiple subscribers within a community, and which the Federal Communications Commission or its successor has certified as compliant with Part 76 of its rules, 47 C.F.R., Part 76, as amended from time-to-time.

16.01.3.18 "Operator" when used with reference to a system, refers to a person (a) who provides service over a Communications System and directly or through one or more Affiliates owns a significant interest in such facility; or (b) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a facility. A person that operates under agreement a telecommunications system or a specific portion of a telecommunications system to provide telecommunications services shall be treated as an operator for purposes of this title.

16.01.3.19 "Overhead facilities" refers to electric utility and communications facilities located above the surface of the

ground, including the underground supports and foundations for such facilities.

16.01.3.20 "Person" includes any individual, corporation, partnership, association, joint stock company, trust, or any other legal entity, but not the City.

16.01.3.21 "Private communications system" means a facility placed in whole or in part in the public rights-of-way for the provision of communications in connection with a person's business, but not encompassing in any respect the provision of telecommunications services.

16.01.3.22 "Private communications system owner" means a person that owns or leases a private communications system.

16.01.3.23 "Programmer" refers to any person who provides video programming to subscribers over a cable system or an open video system, excluding video programming delivered not for a charge over a public, educational, or governmental ("PEG") channel.

16.01.3.24 "Public Rights-of-Way" mean the public streets and easements which, under the City Charter, the Tacoma Municipal Code, City ordinances, and applicable laws, the City has authority to grant franchises, permits, or licenses for use thereof or has regulatory authority thereover, and as may be more specifically defined in the franchise, license, or permit granting any right to or use thereof, excluding railroad rights-of-way, airport, and harbor areas. public rights-of-way for the purpose of this title do not include buildings, parks, poles, or similar facilities or property owned by or leased to the City, including, by way of example and not limitation, structures in the public rights-of-way such as utility poles and light poles.

16.01.3.25 "Reseller" refers to any person who resells a telecommunications service, for which he makes a separate charge, provided over a telecommunications system, where

that person does not own or lease the underlying telecommunications system used for the transmission.

16.01.3.26 "Telecommunications service" means the transmission for hire of information in electronic or optical form, including, but not limited to, voice, video, or data, whether or not the transmission medium is owned by the provider itself. Telecommunications service includes telephone service but does not include cable service or over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto.

16.01.3.27 "Telecommunications system" means a tangible facility that is used to provide one or more telecommunications services, any portion of which occupies public rights-of-way. The term telecommunications system by way of example, and not limitation, includes wires, equipment cabinets, guys, conduit, radio transmitting towers, poles, other supporting structures, and associated and appurtenant facilities used to transmit telecommunications signals. The term telecommunications system includes all devices mounted on light poles in the public rights-of-way through which Telecommunications services are originated or terminated. An open video system is not a telecommunications system to the extent that it provides only video services; a cable system is not a telecommunications system to the extent that it provides only cable service.

16.01.3.28 "Title," when used in the context of referring to this title of the Tacoma Municipal Code, shall mean this Title 16 of the Tacoma Municipal Code and Chapters 16.01 through 16.06 of this title 16.

16.01.3.29 "Transfer" means any transaction in which:

(i) All or a portion of the Communications System is sold or assigned (except a sale or assignment that results in

removal of a particular portion of the facility from the public rights-of-way);

(ii) There is any change, acquisition, or direct or indirect transfer of control of the franchisee or licensee; or

(iii) The rights and/or obligations held by the franchisee or licensee under the franchise or license are transferred, sold, assigned, or leased, in whole or in part, directly or indirectly, to another party. It will be presumed that any transfer or cumulative transfer of voting interest of 10 percent or more is transfer of control within the meaning of (ii). In succeeding provisions of this title, all these activities are referred to as franchise transfers.

16.01.3.30 "Underground facilities" refers to electric utility and communications facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.4 Franchise required.

16.01.4.1 Purpose and characteristics. In order to enable the City to treat persons providing similar services similarly, as may be appropriate to comply with applicable law and considering differences in circumstances, and to comply with requirements of federal law which may require the City to separate its authority over cable systems from its authority over other providers of telecommunications services, the City requires individual franchises for the provision of particular services. The revocation of a franchise for one particular service in and of itself will not affect the authority of a franchise holder to continue to occupy the rights-of-way to provide services for which it holds other franchises. No franchise shall be exclusive. The issuance of a franchise shall not affect the City's right to itself construct, operate, or repair any communications facility, with or without a franchise.

16.01.4.2 Franchise Requirement. An operator of a cable system must obtain a franchise prior to constructing a cable system or providing cable service; an operator of a telecommunications facility must obtain a franchise prior to constructing a telecommunications facility or providing telecommunications services; an operator of an open video system must obtain a franchise before constructing an open video system or providing services via an open video system. The fact that a particular franchised communications facility may be used for multiple purposes does not obviate the need to obtain a franchise for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a cable franchise and, should it intend to provide telecommunications services over the same facilities, must also obtain a telecommunications franchise. A reseller or a programmer uses the public rights-of-way subject to the condition that it may be required to obtain a license upon request of the City, and to pay compensation for such use as required by the City, subject to limits imposed by state law. No franchise shall become effective without the franchisee signing an acceptance of the ordinance which grants it the franchise.

16.01.4.3 Exceptions. Subject to the requirements of the City Charter, a franchise requirement and the franchise application process may be waived in whole or in part for a telecommunications system where the City determines the use of the public rights-of-way is de minimis. For such facilities, the City may issue a license. In addition, every private communications system owner must obtain a license. Every license shall include or be read to include, as if stated there in, a reservation of rights by the City to require the licensee to obtain a franchise if the City determines that the license is being used in a manner that creates a competitive advantage for that operator or otherwise unduly discriminates in favor of such entity. In

any case, the license must provide that if limitations of the license are violated, the entity must pay at least the corresponding maximum franchise fee required by this title.

16.01.4.4 Nature Of Grant. Neither a franchise nor a license shall convey title, equitable or legal, in the public rights-of-way. The right granted is only the right to occupy those portions of the public rights-of-way to which the City has the right to grant access, for the purposes and for the period stated in the franchise or license, and, subject to the limitations in this section and elsewhere in this title, the right may not be subdivided or subleased. Every franchise shall be:

16.01.4.4.1 Interpreted in a manner that conforms to the requirements of Article VIII of the Tacoma City Charter;

16.01.4.4.2 Deemed to include all the provisions that are required to be in a franchise under that Article, as if fully set forth in the franchise;

16.01.4.4.3 Deemed to provide for forfeiture under the circumstances set forth in the Charter, as well as under the provisions of this title and any franchise ordinance thereunder; and

16.01.4.4.4 Construed to exclude the grant of any rights in any easement granted for or in favor of public utility facilities or operations, unless the franchise or license shall expressly state otherwise.

No reference herein, or in any franchise or license, to a public right-of-way shall be deemed to be a representation or guarantee by the City that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and a franchise shall be deemed to grant no more than those rights which the City may have the undisputed right and power to give. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.5 Cost recovery.

16.01.5.1 Purpose. To ensure that the City, as far as possible, is compensated for the rights granted, and receives fair market value for use of public rights-of-way over which it exercises control, or which is held in public trust; and in order that the City is compensated for expenses arising from the use of those public rights-of-way; the City shall require persons using its public rights-of-way to provide cable service, telecommunications service, open video system services, and private communications system owners to pay compensation as provided in this title.

16.01.5.2 Compensation For Use. Every operator of a communications system shall pay a franchise fee or license fee as required by this title except as provided in Section 16.01.5.5. Every operator that is subject to the exceptions in Section 16.01.5.5 and every reseller or programmer uses the rights-of-way subject to the condition that, should the exception ever be eliminated or modified, that operator or reseller or programmer shall be obligated to pay such compensation that would otherwise be required in the absence of the exception.

16.01.5.3 Payments Required. Except as otherwise expressly provided in this title, every cable operator; every operator of a telecommunications system; every operator of an open video system; and every private communications owner must:

16.01.5.3.1 Pay an application fee for the consideration of an application for issuance, renewal, transfer, or modification of a franchise or license in an amount that allows the City to recover its actual administrative expenses incurred in receiving, reviewing, processing, considering, denying, or approving the issuance, renewal, transfer, or modification of a franchise or license. The initial deposit of the application fee for the consideration of an application for issuance, renewal, transfer, or modification of a

franchise shall be in the amount of $5,000, or for a license in the amount of $1,000, which deposit shall be submitted with the Application. The City may, as costs are incurred, draw upon the deposit to recover its administrative costs, including, but not limited to, the reasonable cost of outside consultants retained by the City related to the City's consideration and processing of a franchise or license. The City Manager, at any time, may require the applicant to deposit additional sums if it appears that the initial deposit or subsequent deposits will be exhausted prior to the final action by the City relating to the consideration by the City of an application for issuance, renewal, transfer, or modification of a franchise or license. The applicant will not be entitled to further consideration by the City of its requested action until such time as the additional deposit required by the City Manager has been deposited with the City. In the event the amount of the deposit of an applicant is in excess of the amount of the administrative expenses of the City related to the action requested, then the applicant shall be entitled to a return of any such excess amount.

16.01.5.3.2 Pay the fees required by Sections 12.02.050 and 12.02.060 of Title 12 of this Code;

16.01.5.3.3 Establish a billable work order to cover costs of issuing permits and inspecting facilities, as provided in Section 16.01.5.6;

16.01.5.3.4 In the event the City determines by resolution or ordinance that an impact assessment shall be assessable, pay such impact assessment to reflect, as far as permissible under applicable law, the damage caused or expected to be caused to the rights-of-way by the installation of the facility; however, any operator that pays the full franchise fee required under this title need only pay the higher of (a) the franchise fee; or (b) the impact assessment.

16.01.5.4 Payment Of Costs. Nothing in this section relieves any Communications System operator of its obligation to bear costs associated with its operations, including but not limited to costs it incurs in moving facilities at the direction of the City.

16.01.5.5 Exceptions. The franchise fees required under this title need not be paid:

16.01.5.5.1 If State law or the City charter requires otherwise; or during any transition period as described in Section 16.01.9 for a current franchise holder. This exception shall be read narrowly; an operator that is engaged in one line of business that is subject to this exception, shall not be excused from paying the franchise fee for its other lines of business. In cases subject to this exception, the highest permissible fee shall be paid.

16.01.5.5.2 In the case of a cable system, a telecommunications system, or an open video system that is not subject to an exception under Section 16.01.4.3 or Section 16.01.5.5.1, and is not designed to provide service in the City, and that does not provide service in the City, or where a particular facility is licensed pursuant to Section 16.01.4.3, the City may establish a fee in lieu of the fees in the franchise specified in this title that recovers an amount, at least equivalent to the market value of the property used in the City.

16.01.5.6 Billable Work Order. Concurrently with the acceptance of a franchise or license and annually thereafter, each communications system operator shall file an annual billable work order with the City Manager to cover the City's actual costs including but not limited to administration, and inspection of the operator's physical facilities and activities in the public rights-of-way. By January 31 of each year, every communications system operator shall deposit with the City Treasurer an amount

calculated by the City Manager to cover the cost of work likely to be performed by the City under that billable work order during the succeeding 12 months. The City may draw upon that deposit to cover its costs. In the event excess funds remain in the operator's billable work order account at the end of the year, such excess shall be refunded or credited to the next year's billable work order. The City Manager at any time may require a communications system operator to replenish the amount deposited if it appears that the initial deposit or subsequent deposits will be exhausted during the course of the year. No permit issued shall be valid or of any force or effect if an operator fails to make the required deposits.

16.01.5.7 Application to Persons That Provide Different Types of Services. The fact that a fee is paid on one type of service provided over a communications system, does not excuse an operator from its duty to pay fees on other types of services provided over that facility as required by this title. As an example, and not as a limitation of the foregoing, a cable operator that pays a franchise fee on revenues derived from the provision of cable services must pay a fee under Chapter 16.02 (Special Rules Applicable to telecommunications systems) to the extent that it provides telecommunications services; likewise, the operator of a telecommunications system must pay a franchise fee under Chapter 16.04 to the extent it provides cable services to subscribers via a cable system.

16.01.5.8 General Rules For Payment Of Fees And Assessments.

16.01.5.8.1 Unless otherwise specified in a franchise or a license, franchise and license fees shall be paid to the City monthly, and not later than 25 days after the end of the month for which the fee or assessment is owed.

16.01.5.8.2 Unless a franchise or license provides otherwise, each franchise or license fee payment shall be accompanied by a statement showing the manner in which the fee was calculated. The statement shall be in a form approved by the City.

16.01.5.8.3 No acceptance by the City of any franchise or license fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such franchise fee payment be construed as a release of any claim the City may have for additional sums payable.

16.01.5.8.4 The franchise or license fee payment is not a payment in lieu of any tax, fee or other assessment except as specifically provided in this title, or as required by applicable law. By way of example, and not limitation, permit fees and business license taxes are not waived and remain applicable.

16.01.5.8.5 Within 90 days following the end of the calendar year, each person which paid a franchise fee based upon gross revenues shall submit a statement, certified as true by the chief financial officer of such person, setting forth gross revenues of the communications system, by category, and describing what revenues were included and excluded in the fee calculation, and any adjustments made to gross revenues. If payments are late, in addition to paying any applicable penalties or damages, the person that owes the fee shall pay interest on the amount owed at the rate of 1 percent per month or faction thereof compounded monthly.

16.01.5.8.6 The City may, from time to time and upon reasonable advance written notice, inspect and audit any and all books and records reasonably necessary to the determination of whether fees have been accurately computed and paid. The operator must provide the books and records or copies thereof to the City or advance the

costs of travel and per diem for an employee or employees of the City to inspect and copy such books and records at any location more than 50 miles outside the City at which such books and records are kept in the course of business, in accordance with the procedures set forth in Section 6.68.320 of this Code.

16.01.5.8.7 Notwithstanding the foregoing, in the event that a person that is obligated to pay a fee ceases to provide service for any reason (including as a result of a transfer), such person shall make a final payment of any amounts owed to the City within 10 calendar days of the date its operations in the City cease, and shall provide a statement of Gross Revenues for the calendar year through the dates operations ceased which statement shall contain the information and certification required by Section 16.01.5.8.5. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.6 General conditions upon use of public rights-of-way.

16.01.6.1 Responsibility For Costs. Except as expressly provided otherwise, any act that a communications system operator, its contractors or subcontractors are required to perform under this Section 16.01.6 shall be performed at their cost. If a communications system operator fails to perform work that it is required to perform within the time provided for performance, the City may perform the work and bill the communications system operator therefor. The communications system operator shall pay the amounts billed within 30 days.

16.01.6.2 Construction Procedures And Placement Of Facilities; Obligation To Minimize Interference With Use Of Public Rights-Of-Way.

16.01.6.2.1 The construction, operation, and repair of communications facilities are subject to the supervision of all of the authorities of the City that have jurisdiction in

such matters and shall be performed in compliance with all laws, ordinances, departmental rules and regulations and practices affecting such system. By way of example, and not limitation, this includes zoning codes and safety codes and City construction standards, including the most current version of the Standard Specifications for Road, Bridge and Municipal Construction, as prepared by the Washington State Department of Transportation (WSDOT) and the Washington State Chapter of American Public Works Association (APWA); the most current version of the APWA Amendments to Division One, and the most current version of the City of Tacoma Amendments thereto. In addition, the construction, operation, and repair shall be performed in a manner consistent with high industry standards. persons engaged in the construction, operation, or repair of communications facilities shall exercise reasonable care in the performance of all their activities and shall use commonly accepted methods and devices for preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public or to property.

16.01.6.2.2 Construction, operation, or repair of a communications system shall not commence until all required permits have been properly filed for and obtained from the proper City officials and all required permits and associated fees paid. In any permit so issued, the City may impose as a condition of the granting of the permit such conditions and regulations as may be necessary to the management of the rights-of-way, including, by way of example and not limitation, for the purpose of protecting any structures in the public rights-of-way, for the proper restoration of such public rights-of-way and structures, and for the protection of the City and the public and the continuity of pedestrian and vehicular traffic.

16.01.6.2.3 Operators of communications systems must follow City-established requirements for placement of

facilities in public rights-of-way, including the specific location of facilities in the public rights-of-way, and must in any event install facilities in a manner that minimizes interference with the use of the public rights-of-way by others, including others that may be installing communications facilities. The City may require that facilities be installed at a particular time, at a specific place, or in a particular manner as a condition of access to a particular right-of-way; may deny access if an operator is not willing to comply with the City's requirements; and may remove, or require removal of, any facility that is not installed in compliance with the requirements established by the City, or which is installed without prior City approval of the time, place, or manner of installation and charge the operator of the facility for all the costs associated with removal; and may require a person using the rights-of-way to cooperate with others to minimize adverse impacts on the rights-of-way through joint trenching and other arrangements.

16.01.6.2.4 Upon order of the City Manager, all work which does not comply with the permit, the approved plans or specifications for the work, or the requirements of this title or other applicable law shall be removed.

16.01.6.2.5 To minimize disruption of public passage or infrastructure, to forestall or relieve exhaustion of rights-of-way capacity, or to protect environmentally sensitive areas, the City may require as a condition of issuing any rights-of-way permit for erection of new poles or construction of underground conduit, the installation of which requires excavation of or along any traveled way that the franchisee, licensee, or holder of the rights-of-way permit emplace pole space or empty conduits in excess of its own present and reasonably foreseeable requirements for the purpose of accommodating the City and/or other franchisees and licensees.

16.01.6.2.6 To the extent possible, operators of communications system shall use existing poles and conduit existing at the time of permitting in installing their system. Additional poles may not be installed in the right-of-way, nor may pole capacity be increased by vertical or horizontal extenders, without the permission of the City Manager.

16.01.6.2.7 Unless otherwise specified in a franchise, all facilities shall be constructed, installed, and located in accordance with the following terms and conditions:

16.01.6.2.7.1 A communications system operator with written authorization from the City Manager to install overhead facilities shall attach its communications system to existing poles only, and then only if surplus space is available.

16.01.6.2.7.2 Whenever all existing utilities are located underground in an area in the City, a communications system operator that wishes to place its facility in the same area must also locate its communications system underground, including facilities, such as drops, which cross private property.

16.01.6.2.7.3 Whenever the owners of poles locates or relocates underground within an area of the City, every communications system operator in the same area shall concurrently relocate its facilities underground.

16.01.6.2.7.4 Whenever an electric utility opens a trench for the purpose of installing or relocating facilities, all communications system operators shall concurrently relocate their facilities underground and if they use the same trench share the cost.

16.01.6.2.7.5 The City Manager may, for good cause shown, exempt a particular system or facility or group of facilities from the obligation to locate or relocate facilities underground, where relocation is impractical, or where the

interest in protecting against visual blight can be protected in another manner. Nothing in the paragraph prevents the City from ordering communications facilities to be located or relocated underground under other provisions of the this code.

16.01.6.2.7.6 Nothing herein prohibits the City from ordering all communication systems to be placed underground in a particular area at any time, it being the intent that the number and extent of overhead facilities and the visual pollution resulting therefrom will, over time, be reduced and eventually, to the extent feasible, eliminated.

16.01.6.2.8 Any and all public rights-of-way, public property, or private property that is disturbed or damaged during the construction, operation or repair of a communications facility shall be promptly repaired by the communications system operator that disturbed or damages the public rights-of-way, public property or private property. Public property and public right-of-way must be restored to the satisfaction of the City or to a condition as good or better than before the disturbance or damage occurred.

16.01.6.2.9 No tree trimming shall be performed without the permission of the City and other affected authorities, and any tree trimming must be performed in strict accordance with the City Code.

16.01.6.2.10 Within 48 hours after notice from the City, a communications system operator shall remove any graffiti on any part of its communications system (including by way of example and not limitation) equipment cabinets. If the operator fails to do so, the City may remove the graffiti and bill the operator for the cost thereof.

16.01.6.3 Relocation Of Facilities.

16.01.6.3.1 A communications system operator shall, by a time specified by the City, protect, support, temporarily

disconnect, relocate, or remove any of its property when required by the City by reason of traffic conditions; public safety; public right-of-way construction; public right-of-way repair (including resurfacing or widening); change of public right-of-way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any other type of government-owned communications system, public work, public facility, or improvement or any government-owned utility; public right-of-way vacation; or for any other purpose where the work involved would be aided by the removal or relocation of the communications facility. Collectively, such matters are referred to below as the "public work."

16.01.6.3.1.1 Except in the case of emergencies, the City shall provide written notice describing where the public work is to be performed at least one week prior to the deadline by which a communications system operator must protect, support, temporarily disconnect, relocate or remove its facilities. A communications system operator may seek an extension of the time to perform such tasks where they cannot be performed in a week even with the exercise of due diligence, and such request for an extension shall not be unreasonably refused.

16.01.6.3.1.2 In the event of an emergency, or where a communications facility creates or is contributing to an imminent danger to health, safety, or property, the City may protect, support, temporarily disconnect, remove, or relocate any or all parts of the communications facility without prior notice, and charge the communications system operator for costs incurred.

16.01.6.3.2 If any person that is authorized to place facilities in the rights-of-way requests another communications system operator receiving the request to protect, support, temporarily disconnect, remove, or relocate its facilities to accommodate the construction, operation, or repair of the

facilities of such other person, the communications system operator shall, after 30 days' advance written notice, take action to effect the necessary changes requested. Unless the matter is governed by a valid contract or a state or federal law or regulation, or unless the communications facility that is being requested to move was not properly installed, the reasonable cost of the same shall be borne by the person requesting the protection, support, temporary disconnection, removal, or relocation and at no charge to the City, even if the City makes the request for such action.

16.01.6.3.3 A communications system operator shall, on the request of any person holding a valid permit issued by a governmental authority, temporarily raise or lower its wires to permit the moving of buildings or other objects. The expense of such temporary removal or raising or lowering of wires shall be paid by the person requesting the same. A communications system operator shall be given not less than seven days' advance notice to arrange for such temporary wire changes.

16.01.6.3.4 A communications system operator may abandon any property in place upon written notice to the City. However, if the City determines within 90 days of the receipt of notice of abandonment from the operator, that the safety, appearance, functioning or use of the public right-of-way and facilities in the public right-of-way will be adversely affected, the operator must remove its property by a date specified by the City.

16.01.6.4 Facility Subject To Inspection; Operator Must Provide Information. Every communications facility shall be subject to the right of periodic inspection and testing by the City to determine compliance with the provisions of this title, a franchise or license agreement, or other applicable law. The City shall have the right, upon request, to be notified and present when the communications system is tested by the operator. Each operator must

respond to requests for information regarding its system and plans for the system as the City may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the plant is being constructed, operated, or repaired.

16.01.6.4.1 Underground Services Alert. Each operator of a communications system that places facilities underground shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark the locations of its underground communications facilities upon request. The operator shall locate its facilities for the City at no charge.

16.01.6.5 Plans For and Publicizing Work.

16.01.6.5.1 Work shall be publicized as the City may direct from time to time. The publication of work may be used to notify the public and operators of other communications systems, of the impending work, in order to minimize inconvenience and disruption to the public.

16.01.6.5.2 Each communications system owner shall provide the City a plan for any initial system construction, or for any substantial rebuild, upgrade or extension of its facility, which shall show its timetable for construction of each phase of the project, and the areas of the City that will be affected.

16.01.6.5.3 The City Manager may from time to time, when the City receives application for a permit to use a particular route, or upon the City Manager's own initiative, designate by published order a route or proposed route for installation of communications facilities and may (1) require all persons who wish to emplace underground facilities along that route or any part thereof to install them during a specified period and (2) otherwise prohibit emplacement of such facilities along the route or any part thereof for 24 months or after such other, longer period as is

necessary to protect the public. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.7 Protection of the City and residents.

16.01.7.1 Indemnification.

16.01.7.1.1 No franchise or other authorization to use the rights-of-way issued to a communications system operator or a private communications system owner shall be valid or effective until and unless the City obtains an adequate indemnity from such operator. The indemnity must at least:

16.01.7.1.1.1 Release the City from and against any and all liability and responsibility in or arising out of the construction, operation or maintenance of the communications facility. Each communications facility operator must further agree not to sue or seek any money or damages from City in connection with the above mentioned matters;

16.01.7.1.1.2 Indemnify and hold harmless the City, its trustees, elected and appointed officers, agents, and employees, from and against any and all claims, demands, or causes of action of whatsoever kind or nature, and the resulting losses, costs, expenses, reasonable attorneys' fees, liabilities, damages, orders, judgments, or decrees, sustained by the City or any third party arising out of, or by reason of, or resulting from or of the acts, errors, or omissions of the communications system operator, or its agents, independent contractors or employees related to or in any way arising out of the construction, operation or repair of the facility.

16.01.7.1.1.3 Provide that the covenants and representations relating to the indemnification provision shall survive the term of any franchise or other authorization and continue in full force and effect as to the party's responsibility to indemnify.

16.01.7.2 Insurance. No franchise or other authorization to use the rights-of-way issued to a communications system operator or a private communications system owner shall be valid or effective until and unless the City obtains assurance that such operator (and those acting on its behalf) have adequate insurance. At a minimum, the following requirements must be satisfied:

16.01.7.2.1 A communications system operator shall not commence construction or operation of the facility without obtaining all insurance required under this paragraph and approval of such insurance by the Risk Manager of the City, nor shall a communications system operator allow any contractor or subcontractor to commence work on its contract or sub-contract until all similar such insurance required of the same has been obtained and approved. The required insurance must be obtained and maintained for the entire period the communications system operator has facilities in the rights-of-way, and for a period thereafter as specified in the minimum coverages described below. If the operator, its contractors, or subcontractors do not have the required insurance, the City may order such entities to stop operations until the insurance is obtained and approved.

16.01.7.2.2 Certificates of insurance, reflecting evidence of the required insurance and naming the City as an additional insured, shall be filed with the City's Risk Manager. For entities that are entering the market, the certificates shall be filed prior to the commencement of construction and once a year thereafter, and as provided below in the event of a lapse in coverage. For entities that have facilities in the rights-of-way as of the effective date of this title, the certificate shall be filed within 60 days of the effective date of this title, annually thereafter, and as provided below in the event of a lapse in coverage, unless a

pre-existing franchise provides for filing of certificates in a different manner.

16.01.7.2.3 These certificates shall contain a provision that coverages afforded under these policies will not be canceled until at least 30 days' prior written notice has been given to the City. Policies shall be issued by companies authorized to do business under the laws of the State of Washington. Financial Ratings must be no less than "A" in the latest edition of "Bests Key Rating Guide", published by A.M. Best Guide.

16.01.7.2.4 In the event that the insurance certificate provided indicates that the insurance shall terminate or lapse during the period of the franchise or license, then in that event, the communications system operator shall furnish, at least 30 days prior to the expiration of the date of such insurance, a renewed certificate of insurance as proof that equal and like coverage has been or will be obtained prior to any such lapse or termination during the balance of the period of the franchise or license under which the communications system operates.

16.01.7.2.5 A communications system owner or operator, and its contractors or subcontractors engaged in work on the operator's behalf in, on, under or over public rights-of-way, shall maintain the following minimum insurance. The City shall be named as an additional insured on the general liability and automotive policies.

16.01.7.2.5.1 Comprehensive general liability insurance to cover liability bodily injury and property damage. Exposures to be covered are: premises, operations, products/completed operations, and certain contracts. Coverage must be written on an occurrence basis, with the following limits of liability:

A. <u>Bodily Injury</u>

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

B. Property Damage

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

C. Personal Injury

Annual aggregate $3,000,000

D. Completed operations and products liability shall be maintained for two years after the termination of the franchise or license (in the case of the communications system owner or operator) or completion of the work for the communications system owner or operator (in the case of a contractor or subcontractor).

E. Property damage liability insurance shall include coverage for the following hazards: X - explosion, C - Collapse, U - underground.

16.01.7.2.5.2 Workers' compensation insurance shall be maintained during the life of this contract to comply with statutory limits for all employees, and in the case any work is sublet, each communications system operator shall require the subcontractors similarly to provide workers' compensation insurance for all the latter's employees unless such employees are covered by the protection afforded by each communications system operator. Each communications system operator and its contractors and subcontractors shall maintain during the life of this policy employers liability insurance. The following minimum limits must be maintained:

A. Workers' Compensation Statutory

B. Employer's Liability $ 500,000 per occurrence

16.01.7.2.5.3 Comprehensive Auto Liability

A. Bodily Injury

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

B. Property Damage

1. Each occurrence $1,000,000
2. Annual aggregate $3,000,000

Coverage shall include owned, hired, and non-owned vehicles.

16.01.7.2.6 Each communications system operator shall hold the City, its agents, and employees, harmless on account of claims for damages to persons, property or premises arising out of its construction, operation or repair of its communications system and name the City as an additional insured.

16.01.7.2.7 In every franchise or license agreement, the City shall reserve the right to require any other insurance coverage it deems necessary depending upon the exposures.

16.01.7.3 Performance/payment bonds. Every operator of a communications facility shall be required to obtain performance bonds and, if necessary, payment bonds to ensure the faithful performance of its responsibilities under this title and any franchise or license, including a sufficient amount to cover removal of facilities and/or restoration of City facilities within right-of-way. The amount of the performance and payment bonds shall be set by the City Manager or may be set in a franchise ordinance in light of the nature of the work to be performed and is not in lieu of any additional bonds that may be required through the permitting process. The bond shall be in a form acceptable to the City Attorney. The City may from time to time increase or decrease the amount of the required

performance bond to reflect changes in risks to the City and to the public.

16.01.7.4 Security Fund. Every communications system operator shall establish a cash security fund or provide the City an irrevocable letter of credit in the amount of $50,000, to secure the payment of fees owed, to secure any other performance promised in a franchise, and to pay any taxes, fees or liens owed to the City. The letter of credit shall be in a form and with an institution acceptable to the City's Director of Finance and in a form acceptable to the City Attorney. Should the City draw upon the cash security fund or letter of credit, it shall promptly notify the communications system operator, and the communications system operator shall promptly restore the fund or the letter of credit to the full required amount. This security fund/letter of credit may be waived or reduced by the City for a franchisee or licensee where the City determines in its discretion that a particular franchisee's or licensee's operations are sufficiently limited that a security fund/letter of credit is not necessary to secure the required performance. The City may from time to time change the amount of the required security fund/letter of credit to reflect changed risks to the City and to the public, including delinquencies in taxes or other payments to the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.8 Enforcement and remedies.

16.01.8.1 City Manager responsible for administration. The City Manager is responsible for enforcing and administering this title, and the City Manager is authorized to give any notice required by law or under any franchise, including by way of example and not limitation, a notice required under 47 U.S.C. § 546. The City Manager is also authorized to seek information from any communications system operator, to establish forms for submission of applications and other information, and to take all other

actions necessary or appropriate to the administration of this title or any franchise. franchises may only be denied, issued or revoked by action of the City Council.

16.01.8.2 Applications for Franchises and Licenses.

16.01.8.2.1 An application must be filed for an initial franchise or license, for a transfer, or for renewal of a franchise or license. Each entity that is required to hold a franchise or license must submit an application therefor to the City Manager in accordance with the requirements of this title. To be accepted for filing, an original and six copies of a complete application for a franchise, and an original and six copies of a complete application for a license must be submitted, showing the routes the applicant proposed to use. All applications shall be available for public inspection. All applications shall include the names and addresses of persons authorized to act on behalf of the applicant with respect to the application.

16.01.8.2.2 An application may be filed by any person on that person's own initiative or in response to a request for proposals. The City Manager is authorized to issue requests for proposals from time to time.

16.01.8.2.3 Every application shall be accompanied by an initial deposit in the amounts of $5,000 for franchises and $1,000 for licenses.

16.01.8.2.4 In addition, an applicant that is awarded a franchise or license, shall pay to the City a sum of money sufficient to reimburse it for all publication expenses incurred by it in connection with the granting of a franchise or license pursuant to the provisions of this title. Such payment shall be made by delivery of payment to the City Treasurer within 30 days after the City furnishes the franchisee or licensee with a written statement of such expenses.

16.01.8.2.5 No franchise shall become effective until all required fees and costs are paid.

16.01.8.2.6 Notwithstanding any other provision of this title, pledges in trust or mortgages of the assets of a franchised or licensed communications system to secure the construction, operation, or repair of the system may be made without application and without the City's prior consent; except that no such arrangement may be made if it would in any respect under any condition prevent the communications system operator or any successor from complying with the franchise or license and applicable law, nor may any such arrangement permit a third party to succeed to the interest of the operator, or to own or control the communications system, without the prior consent of the City. Any mortgage, pledge or lease shall be subject to and subordinate to the rights of the City under any franchise, this title, or other applicable law.

16.01.8.2.7 The City Council may, in its sole discretion which is hereby reserved, (1) approve or disapprove a license; and (2) require such terms and conditions in the license agreement as deemed in the best interest of the City. The City Manager or City Council may request such additional information from an applicant for a license as deemed appropriate in order to proceed with consideration of the application.

16.01.8.3 Minimum Contents of Every Franchise or License. In addition to satisfying the other applicable requirements of this Chapter, every franchise or license for a communications system shall contain the following provisions:

16.01.8.3.1 The franchise or license shall provide that neither the granting of any franchise or license, or any provision thereof, shall constitute a waiver or bar to the exercise of any governmental right or power, police power,

or regulatory power of the City as may exist at the time the franchise is issued or thereafter be obtained.

16.01.8.3.2 The franchise or license shall only authorize occupancy of the right-of-way to provide the services and for the purposes described in the franchise or license.

16.01.8.3.3 A franchise or license shall be a privilege that is held in the public trust and personal to the original franchisee. The franchise or license shall ensure that no transfer of the franchise or license may occur, directly or indirectly, without the prior consent of the City; except as contemplated by Section 16.01.8.2.6 or as otherwise expressly provided in this title.

16.01.8.3.4 The franchise or license shall ensure that any person placing a communications system in the public rights-of-way will not unlawfully discriminate in hiring, in contracting, or in the provision of services.

16.01.8.3.5 The franchise or license shall contain appropriate provisions for enforcement, compensation, and protection of the public, consistent with the other provisions of this title.

16.01.8.3.6 The franchise or license shall be for a specified term, set forth in the franchise or license. No franchise issued under this title shall be for a term of longer than ten years, unless the Council determines that a longer period would be in the City's interest. No license issued under this title shall be for a term of longer than five years.

16.01.8.3.7 Such other terms as are required by the City Charter.

16.01.8.3.8 License shall be discretionary.

16.01.8.4 Penalties. Any person found to have occupied or carried out activities in the public rights-of-way without first having obtained or having in effect a valid franchise, license, or permit as required by this title shall be guilty of a

misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment not exceeding 90 days or by both such fine and imprisonment. Each day that any such occupancy or activity shall continue in violation of this title shall constitute a separate offense.

16.01.8.5 Revocation, Reduction of Term, or Forfeiture of Franchise or License.

16.01.8.5.1 Licenses shall be revocable at will.

16.01.8.5.2 Where, after notice and providing the franchisee an opportunity to be heard (if such opportunity is timely requested by a franchisee), the City finds that the facility is being maintained or operated in violation of this title or in substantial violation of the terms of the franchise, the City may make an appropriate reduction in the remaining term of the franchise or revoke the franchise. The City Manager is authorized to establish and conduct a proceeding that complies with the requirements of this Section 16.01.8.5.2, and to issue a recommended decision, but any such decision may be appealed to the City Council. Any appeal must be filed within 30 days of the decision of the City Manager or it shall be deemed waived. Notwithstanding the foregoing, the franchise may only be revoked if the franchisee (1) was given notice of the default; and (2) 30 days to cure the default; and (3) the franchisee failed to cure the default, or to propose a schedule for curing the default acceptable to the City where it is impossible to cure the default in 30 days. The required notice may be given before the City conducts the proceeding required by this paragraph. No opportunity to cure is required for repeated violations, and fraud shall be deemed incurable.

16.01.8.5.3 Notwithstanding the foregoing, Section 16.01.8.5.2, the City may declare a franchise forfeited without opportunity to cure or the notice required by Section 16.01.8.5.2 where the franchisee (1) fails to begin to

exercise its rights under the franchise within a period specified in the franchise ; (2) stops providing service it is required to provide in the franchise; (3) without the prior consent of the City, transfers the franchise; (4) fails to pay the annual occupancy fees or franchise fees owed hereunder; or (5) defrauds or attempts to defraud the City or the operator's customers. However, a franchisee shall have the right to receive 30 days' prior notice of an intent to declare a franchise forfeited, and shall have the opportunity to show cause why the franchise should not be forfeited.

16.01.8.5.4 Notwithstanding the foregoing Sections 16.01.8.5.1-1.8.5.3, a franchise or license will automatically terminate by force of law 120 calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the franchisee or licensee, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding. However, the franchise or license may be reinstated within that 120 day period, if: (A) such assignment, receivership or trusteeship has been vacated; or (B) such assignee, receiver or trustee has fully complied with the terms and conditions of this title and the franchise or license and has executed an agreement, approved by any court having jurisdiction, assuming and agreeing to be bound by the terms and conditions of this title and the franchise or license. However, in the event of foreclosure or other judicial sale of any of the facilities, equipment or property of a franchisee or licensee, the City may revoke the franchise or license, following a public hearing before the City Council, by serving notice upon the franchisee or licensee and the successful bidder at the sale, in which event the franchise or license and all rights and privileges of the franchise or license will be revoked and will terminate 30 calendar days after serving such notice, unless: (A) the City has approved the transfer of the franchise or

license to the successful bidder; and (B) the successful bidder has covenanted and agreed with the City to assume and be bound by the terms and conditions of the franchise or license and this title.

16.01.8.6 Effect of Termination or Forfeiture. Upon termination or forfeiture of a license or franchise, whether by action of the City as provided above, or by passage of time, the franchisee or licensee shall be obligated to cease using the communications system for the purposes authorized by the franchise. The City may either take possession of some or all of the licensee's or franchisee's facilities in the public rights-of-way or require the licensee or franchisee or its bonding company to remove some or all of the licensee's or franchisee's facilities from the public rights-of-way and restore the public rights-of-way to its same, or better, condition. Should the franchisee or licensee neglect, refuse, or fail to remove such facility, the City may remove the facility at the expense of the franchisee or licensee. The obligation of the licensee or franchisee to remove shall survive the termination of the franchise or license for a period of two years; provided, that this provision does not permit the City to take possession of, or require the franchisee or licensee to remove, any facilities that are used to provide another service for which the franchisee holds a valid franchise or license issued by the City.

16.01.8.7 Remedies Cumulative. All remedies under this title and any franchise or license are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve a communications system operator of its obligations to comply with its franchise or license. Remedies may be used singly or in combination; in addition, the City may exercise any rights it has at law or equity. Recovery by the

City of any amounts under insurance, the performance bond, the security fund or letter of credit, or otherwise, does not limit a communications system operator's duty to indemnify the City in any way; nor shall such recovery relieve a communications system operator of its obligations under a franchise or license, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have.

16.01.8.8 Access to Books And Records.

16.01.8.8.1 Each communications system operator shall provide the City access to all books and records related in whole or in part to the construction, operation, or repair of the communications system so that the City may inspect and copy these books and records pertaining to the franchise and other matters within the City's jurisdiction. The operators' obligation includes the obligation to produce all books and records related to revenues derived from the operation of the communications system to the extent that system revenues affect the fees charged or burdens imposed on the operator under this franchise. An operator is responsible for obtaining or maintaining the necessary possession or control of all such books and records related to the construction, operation or repair of the communications system, so that it can produce the documents upon request. Books and records must be maintained for a period of five years, except that (a) any record that is a public record must be maintained for no less than the period required by State law; and (b) a franchise may specify a shorter period for certain categories of voluminous books and records where the information contained therein can be derived simply from other materials.

16.01.8.8.2 For purposes of this title, the terms "books and records" shall be read expansively to include information in whatever format stored. Books and records requested shall

be produced to the City at the location designated by the City Manager, or by agreement or pursuant to Sections 16.01.8.8.3.

16.01.8.8.3 If any books and records are too voluminous, or for security reasons cannot be copied and moved, then a communications facility operator may request that the inspection take place at some other location mutually agreed to by the City and the operator, provided that (1) the operator must make necessary arrangements for copying documents selected by the City after its review; and (2) the operator must pay all travel and additional copying expenses incurred by the City (above those that would have been incurred had the documents been produced in the City) in inspecting those documents or having those documents inspected by its designee.

16.01.8.8.4 Without limiting the foregoing, the operator of a communications facility shall provide the City the following within 10 days of their receipt or (in the case of documents created by the operator or its Affiliate) filing:

16.01.8.8.4.1 Notices of deficiency or forfeiture related to the operation of the communications Facility; and

16.01.8.8.4.2 Copies of any request for protection under bankruptcy laws, or any judgment related to a declaration of bankruptcy by the franchisee or by any partnership or corporation that owns or controls the franchisee directly or indirectly.

16.01.8.9 Retention of records; relation to privacy rights. Each communications facility operator shall take all reasonable steps required, if any, to ensure that it is able to provide the City all information which must be provided or may be requested under this title, a franchise or license, or applicable law, including by providing appropriate subscriber privacy notices. Each operator shall be responsible for redacting any data that applicable law

prevents it from providing to the City. Nothing in this section shall be read to require an operator to violate state or federal law protecting subscriber privacy.

16.01.8.10 Reports. The City Manager may require operators of communications facilities to maintain records, and to prepare reports relevant to determining the compliance of the communications facility operator with the terms and conditions of this title and their franchises or licenses. operators shall maintain such records and provide such reports additionally as are specifically required by Chapters 16.01,16.02, 16.03, and 16.04 of this title.

16.01.8.11 Maps. Each communications facility operator shall maintain accurate maps and improvement plans which show the location, size, and a general description of all facilities installed in the public rights-of-way and any power supply sources (including voltages and connections). Maps shall be based upon post-construction inspection to verify location. The operator of each communications facility shall provide a map to the City showing the location of its facilities, in such detail and scale as may be directed by the City Engineer. New system maps shall be promptly submitted to the City when the facility expands or is relocated. Copies of maps shall be provided on disk, in a commercially available electronic format specified by the City Engineer.

16.01.8.12 Compliance with Laws. Each franchisee and licensee shall comply with all applicable laws heretofore and hereafter adopted or established during the entire term of its franchise or license.

16.01.8.13 Reservation of Authority. The City may do all things which are necessary and convenient in the exercise of its jurisdiction under this title.

16.01.8.14 No Waiver. The failure of the City to insist on timely performance or compliance by any person holding a

license or franchise shall not constitute a waiver of the City's right to later insist on timely performance or compliance by that person or any other person holding such a license or franchise.

16.01.8.15 Title Not a Contract. The City expressly reserves the right to amend this title and any franchise thereunder from time-to-time in the exercise of its lawful powers. The provisions of this title shall not be construed to create or be a contract. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.9 Transitional provisions.

16.01.9.1 Persons Operating Without a Franchise or License. The operator of any facility, the operation of which is required to be franchised or licensed under this title, other than a person holding a lease under Section 16.01.9.3, shall have three months from the effective date of this title to file one or more applications for a franchise or a license under this ordinance. Any operator or private communications system owner timely filing such an application shall not be subject to a penalty under Section 16.01.8.4 hereof for failure to have such a franchise or license as long as said application remains pending; provided, however, nothing herein shall relieve any communications system operator of any liability for its failure to obtain any franchise, permit or other authorization required under other provisions of the Tacoma Municipal Code, and nothing herein shall prevent the City from requiring removal of any facilities installed in violation of the Tacoma Municipal Code.

16.01.9.2 Persons Holding Franchises or Licenses. Any person holding an outstanding franchise or license from the City for a communications system to provide specified services or for a private communications system may continue to operate under the existing franchise or license to the conclusion of its present term (but not any renewal or

extension thereof) with respect to those activities expressly authorized by the franchise or license; provided, however, that such franchisee or licensee may elect at any time to apply for a superseding franchise or license under this title and must seek additional franchises or licenses to provide other services; and provided further that, such person shall be subject to the other provisions of this title to the extent permitted by law; provided further, that licenses that are revocable at will may be revoked by the City, and the licensee may be required to obtain a new license under this title.

16.01.9.3 Persons Holding Leases for Property in the Right-Of-Way. Any lessee under a lease from the City for an antenna site located in the right-of-way that is valid and in force on the effective date of this title may continue to occupy such antenna site to the conclusion of the term of the lease (but not any renewal or extension thereof), in accordance with the terms of such lease; provided, however, that such lessee may elect at any time to apply for a superseding lease, franchise or license under this title.

16.01.9.4 Persons with Pending Applications. Pending applications shall be subject to this title. A Person with a pending application shall be provided 30 days from the effective date of this title to submit additional information to comply with the requirements of this title governing applications.

16.01.9.5 Transitional Rules to be Narrowly Interpreted. It is the intent of the City to apply the provisions of this title to communications system operators, including local exchange carriers that now occupy or may in the future occupy public rights-of-way, except to the extent federal or state law prevents it from doing so. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.10 Special rules for government entities.

Nothing herein requires the City to apply the provisions of this title to a government entity if the City determines that it is not in the public interest to do so, and nothing in this title shall be read to require a government entity to comply with this title, where the City cannot enforce the title against such entity as a matter of law. The City is authorized to enter into agreements with other governmental agencies to facilitate the City's use and management of its rights-of-way, and such agreements shall be enforceable according to their respective terms and notwithstanding any provision of this title. (Ord. 26053 § 1; passed April 15, 1997.)

16.01.11 No waiver.

The failure of the City to enforce any provision of this title on any occasion shall not operate as a waiver or estoppel of this right to enforce any provision of this title on any other occasion, nor shall the failure to enforce any prior ordinance or Charter provisions affecting communications facilities or Communications System operators act as a waiver or estoppel against application of this title or any other provision of applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.02

SPECIAL RULES APPLICABLE TO TELECOMMUNICATIONS FACILITIES AND TELECOMMUNICATIONS SERVICE PROVIDERS

Sections:

16.02.1 Application for a Franchise.
16.02.1.1 Contents Of Application For Initial Or Renewal Franchise
16.02.1.2 Additional information regarding affiliates; presumptions

16.02.1.3 Applications for transfer
16.02.1.4 City review

16.02.2 Compensation.
16.02.2.1 Right-of-way fee
16.02.2.2 Gross revenues defined
16.02.2.3 Public record

16.02.3 Additional franchise requirements.
16.02.3.1 Reservation of authority
16.02.3.2 Provision of facilities and equipment
16.02.3.3 Annual reports

16.02.1 Application for a Franchise.

16.02.1.1 Contents Of Application For Initial Or Renewal Franchise. In order to obtain an initial or renewal franchise, an operator of a telecommunications facility must apply for a franchise. The application must contain the following information, and such information as the City may from time to time require.

16.02.1.1.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.02.1.1.2 A proposal for construction of a telecommunications facility, that includes at least the following:

16.02.1.1.2.1 a description of the services that are to be provided using the facility.

16.02.1.1.2.2 the location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if

any, that will be generated by the operation of the same; provided, however, that, if some of the descriptive data is not available at the time of application, the franchise may be issued subject to conditions that the data be filed and approved by the City before construction begins and that the franchise will be deemed to be forfeited if the data is not supplied and approved; provided, further, that the foregoing proviso does not authorize the grant of a franchise where there is not sufficient information to appraise the impact of the applicant's proposal; provided further, in the event that Sections 16.02.1.1.2.2-.3 require information that is a business or trade secret and/or proprietary information and the operation wishes to protect the information against disclosure, then operator shall provide said information to City in a separate envelope marked "Proprietary Information: DO NOT DISCLOSE." The City will exercise good faith efforts to protect the confidentiality of the business or trade secrets or proprietary information that is designated as such; provided further, that (A) in the event a public disclosure request is made for information marked as proprietary, and if the City Attorney determines that said information may be subject to being disclosed; or (B) the City determines that the information should be disclosed in connection with its enforcement of any provision of this title, or in the exercise of its police or regulatory powers; then the City shall notify the operator of the operator's opportunity to seek a protective order from a court with appropriate jurisdiction. In the event that a protective order is not obtained within 30 days or, if shorter, the time limitation set forth in State law, then City may disclose said information. The operator is obligated to reimburse and indemnify City for all costs, damages and attorney fees that may be awarded or assessed by the court for any actions the City took at the request of operator.

16.02.1.1.2.3 A map of the general route the facility will follow; a designation of the portions of the system that will be placed above ground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system above ground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities; provided, however, that any proprietary information required under this subparagraph as well as the preceding subparagraph shall be subject to the non-disclosure procedure prescribed in the proviso of the preceding subparagraph.

16.02.1.1.2.4 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.02.1.1.2.5 Identification of the area of the City to be served by the proposed system, including a description of the proposed franchise area's boundaries.

16.02.1.1.3 Evidence satisfactory to the City that the applicant has the financial resources to complete the proposed project, and to construct, operate and repair the proposed facility over the franchise term. It is not the intent of the City to require an applicant to prove that the services it proposed to offer will succeed in the marketplace.

16.02.1.1.4 Evidence satisfactory to the City that the applicant is technically qualified to construct, operate and repair the proposed facility. At a minimum, the applicant

must show that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete.

16.02.1.1.5 Evidence satisfactory to the City that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.02.1.1.5.1 Has received, or is in a position to receive, necessary authorizations from State and Federal authorities;

16.02.1.1.5.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title; and

16.02.1.1.5.3 Is willing to accept a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or maintenance of its facilities; and has not entered into any agreement that would prevent it from doing so;

16.02.1.1.6 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.02.1.1.7 An applicant may show that it would be inappropriate to deny it a franchise under Section 16.02.1.1.5.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of telecommunications facilities.

16.02.1.1.8 Additional information regarding Affiliates. To the extent that the applicant is in any respect relying on the financial or technical resources of another person, including another affiliate, the proofs required by Sections 16.02.1.1.3-16.02.1.1.5 should be provided for that person.

16.02.1.2 Presumptions. An applicant will be presumed to have the requisite financial, technical, or legal qualifications if its application shows that such qualifications have been reviewed and approved by the Washington Utilities and Transportation Commission; or, if applicant is a holder of a franchise in the City for a cable system or open video system, provided that, notwithstanding this presumption, the City may require the applicant to provide and may consider information regarding applicant's financial, technical, or legal qualifications as the City determines necessary to protect the public interest. An applicant that is leasing existing facilities from a franchised communications facility operator, where the applicant will have no responsibility for any activity that involves work in the public rights-of-way, may rely upon the franchisee's technical qualifications, and will be presumed to have the necessary financial qualifications.

16.02.1.3 Applications For Transfer. An application for a transfer of a franchise must contain the same information required by Section 16.02.1.1, except that, if the transferor submitted an application under Section 16.02.1.1, to the extent information provided by the transferor under Section 16.02.1.1.2 remains accurate, the transferee may simply cross-reference the earlier application.

16.02.1.4 City Review. The City may request such additional information as it finds necessary, and require such modifications to the system proposed as may be necessary in the exercise of the City's authority over telecommunications systems. Once the information required by the City has been provided, the application

shall be subject to review by the City and any approval shall be subject to the City's determination that:

16.02.1.4.1 The applicant has the qualifications to construct, operate and repair the system proposed in conformity with applicable law.

16.02.1.4.2 The applicant will accept the modifications required by the City to its proposed system. This section does not authorize the City to exercise authority it does not otherwise have under applicable law.

16.02.1.4.3 The applicant will enter into a franchise and comply with any conditions precedent to its effectiveness.

16.02.1.4.4 In the case of a transfer, any approval will also be subject to a determination that:

16.02.1.4.4.1 There will be no adverse effect on the public interest, or the City's interest in the franchise;

16.02.1.4.4.2 Transferee will agree to be bound by all the conditions of the franchise and to assume all the obligations of its predecessor; and

16.02.1.4.4.3 Any outstanding compliance and compensation issues will be resolved or preserved to the satisfaction of the City.

16.02.1.4.5 An applicant shall not be issued a franchise if it files or in the previous three years filed materially inaccurate or misleading information in a franchise application or intentionally withheld information that the applicant lawfully is required to provide. An application for a franchise area may be denied if the franchisee has no plans for constructing a system within the entire area for which the franchise is sought.

16.02.2 Compensation.

16.02.2.1 Rights-of-Way Fee. Subject only to the exceptions set out in Sections 16.01.4.3, 16.01.5.2, and 16.01.5.5 of this

title, every operator of a telecommunications facility must pay compensation to the City equal to 6 percent of gross revenues, or such other amount as may be provided in a franchise.

16.02.2.2 Gross Revenues Defined. Gross Revenues, for purposes of this Chapter 16.02, includes all revenue derived directly or indirectly by the operator; or derived directly or indirectly by their affiliates, subsidiaries, parent companies, and any person in whom the operator has a financial interest, or revenues received by the operator from a person with whom operator has a revenue-producing agreement, from the provision of telecommunications services via the telecommunications system, which provision shall be interpreted to include all services and ancillary equipment; provided, however, that this term shall not include taxes imposed directly upon any subscriber or user by the Federal, State, county, or other governmental unit and required to be collected by the operator; provided further, that a franchisee may deduct from its gross revenues those revenues received from a lessee that holds a franchise or license under this title, if that lessee submits a certificate to the telecommunications operator stating that it has paid the fees it owes the City for the applicable reporting period. Copies of the certificate must be provided to the City.

16.02.2.3 Public Record. The compensation paid by each provider for use of public rights-of-way shall be a matter of public record and available for public inspection. (Ord. 26053 § 1; passed April 15, 1997.)

16.02.3 Additional Franchise requirements.

16.02.3.1 Reservation of Authority. In addition to satisfying the requirement of Chapter 16.01, every franchise shall specifically reserve the right to require a franchisee to construct facilities or to make payments that may be required to comply with any universal service plan the City may lawfully adopt; and to comply with any lawful

requirements to ensure continued quality of telecommunications services, safeguard the right of consumers, or otherwise protect the public safety and welfare.

16.02.3.2 Provision of Facilities and Equipment. The City may accept or require an operator of a telecommunications system to provide facilities or equipment for use by the City, the schools or any other governmental entity in the City as a condition of the license grant, except as prohibited by law; or may require license holders to share in the costs associated with provisions of such facilities and by other communications system operators.

16.02.3.3 Annual Reports. No later than 90 days after the end of its fiscal year, all operators shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.02.3.3.1 A summary of the previous year's activities in the development of the system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of service;

16.02.3.3.2 A certified revenue report by the operator's Chief Financial Officer from the previous calendar year for the system.

16.02.3.3.3 An ownership report, indicating all persons who at the time of filing control or own an interest in the operator of 10 percent or more;

16.02.3.3.4 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the system;

16.02.3.3.5 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as

aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the cable system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with any FCC technical standards.

16.02.3.3.6 Once the information required by Sections 16.02.3.3.1-16.02.3.3.5 has been filed, it need be refiled only if it changes. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.03

SPECIAL RULES APPLICABLE TO OPEN VIDEO SYSTEMS

Sections:

16.03.1 Application for a Franchise.
- 16.03.1.1 Contents of application for initial or renewal franchise
- 16.03.1.2 Additional information regarding affiliates; presumptions
- 16.03.1.3 Applications for transfer
- 16.03.1.4 City review

16.03.2 Compensation.

16.03.3 Annual reports.

16.03.1 Application for a Franchise.

16.03.1.1 Contents of application for initial or renewal franchise. In order to obtain an initial or renewal franchise, an operator of an open video system must apply for a franchise. The application must contain the following information, and such information as the City may from time to time require.

16.03.1.1.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.03.1.1.2 A proposal for construction of the open video system that includes at least the following:

16.03.1.1.2.1 A description of the services that are to be provided over the facility.

16.03.1.1.2.2 Identification of the area of the City to be served by the proposed system, including a description of the proposed franchise area's boundaries.

16.03.1.1.2.3 The location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if any, that will be generated by the operation of the same.

16.03.1.1.2.4 A map of the route the facility will follow; a designation of the portions of the system that will be placed aboveground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system aboveground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities.

16.03.1.1.3 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.03.1.1.4 Evidence satisfactory to the City that the applicant has the financial resources to complete the proposed project, and to construct, operate and repair the proposed facility over the franchise term. It is not the intent of the City to require an applicant to prove that the services it proposed to offer will succeed in the marketplace.

16.03.1.1.5 Evidence satisfactory to the City that applicant is technically qualified to construct, operate and repair the proposed facility. At a minimum, the applicant must show that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete.

16.03.1.1.6 Evidence satisfactory to the City that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.03.1.1.6.1 Has received, or is in a position to receive, necessary authorizations from state and federal authorities;

16.03.1.1.6.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title;

16.03.1.1.6.3 Is willing to enter into a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or maintenance of its facilities, and has not entered into any agreement that would prevent it from doing so;

16.03.1.1.7 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.03.1.1.8 An applicant may show that it would be inappropriate to deny it a franchise under Section 16.03.1.1.6.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of open video system facilities.

16.03.1.2 Additional Information Regarding Affiliates; Presumptions. To the extent that the applicant is in any respect relying on the financial or technical resources of another person, including another Affiliate, the proofs required by Sections 16.03.1.1.3-16.03.1.1.5 should be provided for that person. An applicant will be presumed to have the requisite financial, or technical or legal qualifications to the extent such qualifications have been reviewed and approved by a state agency of competent jurisdiction; or if applicant is a holder of a franchise in the City for a cable system or open video system, and conduct under such other franchise provides no basis for additional investigation.

16.03.1.3 Applications For Transfer. An application for a transfer of a franchise must contain the same information required by Section 16.03.1.1, except that, if the transferor submitted an application under Section 16.03.1.1, to the extent information provided by the transferor under Section 16.03.1.1.2 remains accurate, the transferee may simply cross-reference the earlier application.

16.03.1.4 City Review. The City may request such additional information as it finds necessary, and require such modifications to the application as may be necessary in the exercise of the City's authority over open video systems. Once the information required by the City has been provided, the application shall be subject to review by

the City and any approval will also be subject to a City determination that:

16.03.1.4.1 The applicant has the qualifications to construct, operate and repair the system proposed in conformity with applicable law.

16.03.1.4.2 The applicant will accept the modifications required by the City to its proposed system. This section shall not be read to authorize the City to exercise authority it does not otherwise have under applicable law.

16.03.1.4.3 The applicant will enter into a franchise and comply with any conditions precedent to its effectiveness.

16.03.1.4.4 In the case of a transfer, the approval is also subject to a determination that:

16.03.1.4.4.1 There will be no adverse effect on the public interest, or the City's interest in the franchise;

16.03.1.4.4.2 Transferee will agree to be bound by all the conditions of the franchise and to assume all the obligations of its predecessor; and

16.03.1.4.4.3 Any outstanding compliance and compensation issues will be resolved or preserved to the satisfaction of the City.

16.03.1.4.5 An applicant shall not be issued a franchise if it files or in the previous three years filed materially inaccurate or misleading information in a franchise application or intentionally withheld information that the applicant lawfully is required to provide. (Ord. 26053 § 1; passed April 15, 1997.)

16.03.2 Compensation.

Every operator of an open video system shall pay compensation to the City as follows:

16.03.2.1 To the extent that the system is used to provide cable services: a percentage of gross revenues each month

equal to the gross revenue percentage paid by any cable operator for the same month; provided, however, that, if there is no cable system operating, the percentage shall be equal to the percentage fee that would have been levied on a cable operator under Chapter 16.04, subject to any limit imposed by federal law. Gross Revenues shall be defined to include all the gross revenues derived from the operation of an open video system to provide cable services, and, except as federal law requires otherwise, shall include the gross revenues of affiliated persons using the capacity of the open video system to provide cable service to subscribers for a fee, less amounts paid to the open video system operator to the extent the operator pays a fee on such revenues. In addition, unless a franchise provides otherwise, an open video system operator (1) shall pay to the City, at a time directed by the City, an amount equal to the highest amount contributed by any entity operating a cable system for and in support of public, educational, and government use (including institutional network use) of its cable system; and (2) to the extent that such entity is providing other support for public, educational or governmental use, the operator must duplicate that support within a time and in a manner directed by the City, or provide a cash equivalent acceptable to the City; or (3) if there is no such entity, the highest amount permitted under applicable law. In applying this section, the City may take such steps as it deems appropriate to ensure that the obligations borne by the open video system operator are no greater or lesser than the obligation imposed upon the cable operator providing the greatest benefits to the community. Further, the City reserves the right, and every franchise shall be interpreted to incorporate the right, to require the operator to pay additional compensation if the provisions of federal law specifying the compensation to be paid by operators changes or is declared invalid, or to ensure that

the operator of an open video system pays no less than the amount paid by any cable operator.

16.03.2.2 To the extent that the open video system is used for the provision of telecommunications services, the open video system operator shall pay the fee required by Chapter 16.02. (Ord. 26053 § 1; passed April 15, 1997.)

16.03.3 Annual reports.

No later than 90 days after the end of its fiscal year, a cable operator shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.03.3.1 A summary of the previous year's activities in the development of the open video system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of cable service;

16.03.3.2 A revenue report from the previous calendar year for the open video system, certified by the operator's chief financial officer.

16.03.3.3 An ownership report, indicating all persons who at the time of filing control or own an interest in the open video system operator of 10 percent or more;

16.03.3.4 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the open video system;

16.03.3.5 An annual report of each entity identified in Section 16.03.3.5 which issues an annual report;

16.03.3.6 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as

aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the open video system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with FCC technical standards.

16.03.3.7 Once the information required by Sections 16.03.3.1-16.03.3.6 has been filed, it need be refiled only if it changes. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.04

SPECIAL RULES APPLICABLE TO CABLE TELEVISION SYSTEMS

Sections:

16.04.1 Additional definitions.
- 16.04.1.1 Access channel
- 16.04.1.2 Basic cable service or basic service
- 16.04.1.3 Cable act
- 16.04.1.4 Cable operator
- 16.04.1.5 Educational access or educational use
- 16.04.1.6 Equitable price
- 16.04.1.7 Fair market value
- 16.04.1.8 Governmental access channel
- 16.04.1.9 Gross revenues
- 16.04.1.10 Non-cable service
- 16.04.1.11 Public access channel
- 16.04.1.12 Service tier
- 16.04.1.13 Subscriber
- 16.04.1.14 User

16.04.2 No exclusivity.

16.04.3 Relation to 47 U.S.C. §§ 545-546.

16.04.4 Applications for grant, renewal, or modification.
- 16.04.4.1 Written application
- 16.04.4.2 Contents of applications
- 16.04.4.3 Procedure for applying for grant of a franchise, other than an application that is subject to 47 U.S.C. §546
- 16.04.4.4 Procedure for applying for grant of a Cable Act renewal franchise
- 16.04.4.5 Informal applications for renewal
- 16.04.4.6 Application for modification of a franchise
- 16.04.4.7 Public hearings

16.04.5 Construction provisions.
- 16.04.5.1 System construction schedule
- 16.04.5.2 Use of cable operator's facilities
- 16.04.5.3 Provision of service/quality of service
- 16.04.5.4 System maintenance
- 16.04.5.5 Continuity of service

16.04.6 Operation and reporting provisions.
- 16.04.6.1 Communication with regulatory agencies
- 16.04.6.2 Reports
- 16.04.6.3 Records required

16.04.7 Rate regulation and consumer protection.
- 16.04.7.1 Scope and applicability
- 16.04.7.2 Rate regulation procedures
- 16.04.7.3 Rate discrimination prohibited
- 16.04.7.4 Redlining prohibited
- 16.04.7.5 Cable customer service standards

16.04.8 Franchise fee.
- 16.04.8.1 Amount of franchise fee

16.04.9 Transfers.
16.04.9.1 City approval required
16.04.9.2 Application
16.04.9.3 Determination by City
16.04.9.4 Transferee's agreement
16.04.9.5 Approval does not constitute waiver
16.04.9.6 Exception for intra-company transfers

16.04.10 Connections to cable systems; use of antennae.
16.04.10.1 Subscriber right to attach
16.04.10.2 Removal of existing antennae

16.04.1 Additional definitions.

The following definitions are in addition to those in Chapter 16.01.

16.04.1.1 "Access channel" means any capacity on a cable system set aside by a franchise for public, educational, or governmental use.

16.04.1.2 "Basic cable service" or "basic service" means any service tier that includes the retransmission of local television broadcast signals.

16.04.1.3 "Cable Act" means the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq., as amended by the Cable Television Consumer Protection and Competition Act of 1992, as further amended by the Telecommunications Act of 1996, as further amended from time to time.

16.04.1.4 "Cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more Affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

16.04.1.5 "Educational access or educational use" means any capacity on a cable system set aside by a franchise for use by accredited educational institutions.

16.04.1.6 "Equitable Price" means fair market value adjusted downward for the harm to the City or subscribers, if any, resulting from a franchisee's breach of its franchise or violation of this title and as further adjusted to account for other equitable factors that may be considered consistent with 47 U.S.C. § 547.

16.04.1.7 "Fair market value" means the price for the cable system valued as a going concern but with no value allocated to the franchise itself.

16.04.1.8 Governmental access channel means any capacity on a cable system set aside by a franchisee for government use.

16.04.1.9 "Gross revenues" refers to gross revenues of any cable operator of a cable system in any way derived from the operation of that cable system to provide cable services in the franchise area. Gross revenues include, by way of illustration and not limitation, monthly fees charged subscribers for any basic, optional, premium, per-channel, or per-program service; installation, disconnection, reconnection, and change-in-service fees; leased channel fees; late fees and administrative fees; revenues received from programmers for carriage of programming on the cable system; revenues from rentals or sales of converters or other equipment; advertising revenues; revenues from program guides; and revenues from home shopping channels. This provision shall be read broadly to prevent the avoidance of franchise fees by a cable operator through arrangements with affiliates. Gross revenues shall not include any taxes on services furnished by a franchisee which are imposed directly on any subscriber or user by the State, City, or other governmental unit and which are

collected by a franchisee on behalf of said governmental unit.

16.04.1.10 "Non-cable service" means any service that is authorized to be distributed over the cable system, other than a cable service.

16.04.1.11 "Public access channel" means any capacity on a cable system set aside by a franchisee for use by the general public, including groups and individuals, and which is available for such use on a legally non-discriminatory basis.

16.04.1.12 "Service tier" means a package of two or more cable services for which a separate charge is made by the franchisee, other than a package of premium and pay-per-view services that is not subject to rate regulation under the Cable Act and applicable FCC regulations because those services are also sold on a true à la carte basis.

16.04.1.13 "Subscriber" means the City, any government entity or any person who legally receives any cable service from a cable operator delivered over that cable operator's cable system.

16.04.1.14 "User" means a person or the City utilizing a channel, capacity or equipment and facilities for purposes of producing or transmitting material, as contrasted with the receipt thereof in the capacity of a subscriber. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.2 No exclusivity.

A franchisee may not require a subscriber or a building owner or manager to enter into an exclusive contract as a condition of providing or continuing service. However, nothing herein prevents a franchisee from entering into an otherwise lawful, mutually desired exclusive arrangement with a building owner or manager of a multiple dwelling unit or commercial subscriber. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.3 Relation to 47 U.S.C. §§ 545-546.

This Chapter 16.04 shall be read and applied so that it is consistent with the Sections 625 and 626 of the Cable Act, 47 U.S.C. §§ 545-546 to the extent the City is required to comply with those Cable Act sections; provided, however, that nothing herein shall be read to incorporate those provisions into the City Code, or prevent the City from challenging their applicability or to give any entity a right or a right of action or impose any obligation on the City which it would not otherwise have under such federal laws. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.4 Applications for grant, renewal or modification of Franchise.

16.04.4.1 Written Application.

16.04.4.1.1 A written application shall be filed with the City for (1) grant of an initial franchise; (2) renewal of a franchise within the meaning of 47 U.S.C. § 546(a)-(g); or (3) modification of a franchise pursuant to this title or a franchise. A request for renewal, pursuant to 47 U.S.C. § 546(h), may also be filed informally, as provided in Section 16.04.4.5.

16.04.4.2 Contents of Applications. Except as expressly required by the City for good cause a request for proposals for a cable franchise shall be deemed to require, and any application submitted pursuant to this Section 16.04.4.1 (and expressly not an informal renewal application submitted within the meaning of 47 U.S.C. § 546(h)) shall contain, at a minimum, the following information:

16.04.4.2.1 Identity of the applicant; the persons who exercise working control over the applicant; and the persons who control those persons, to the ultimate parent.

16.04.4.2.2 Identification of the area of the City to be served by the proposed cable system, including a description of the proposed franchise area's boundaries.

16.04.4.2.3 A detailed description of the physical facilities proposed, which shall include at least the following:

16.04.4.2.3.1 A description of the channel capacity, technical design, performance characteristics, headend, access (and institutional network) facilities and equipment;

16.04.4.2.3.2 The location of proposed facility and facility design, including a description of the miles of plant to be installed, and a description of the size of equipment cabinets, shielding and electronics that will be installed along the plant route, the power sources that will be used and a description of the noise, exhaust and pollutants, if any, that will be generated by the operation of the same; provided, however, that, if some of the descriptive data is not available at the time of application, the franchise may issue subject to conditions that the data be filed and approved by the City before construction begins and that the franchise will be deemed to be forfeited if the data is not supplied and approved; provided, further, that the foregoing proviso does not authorize the grant of a franchise where there is not sufficient information to appraise the impact of the applicant's proposal; provided further, in the event that Sections 16.04.4.2.3.2-16.04.4.2.3.3 requires information that is a business or trade secret and/or proprietary information and the operation wishes to protect the information against disclosure, then operator shall provide said information to City in a separate envelope marked "Proprietary Information: DO NOT DISCLOSE." The City will exercise good faith efforts to protect the confidentiality of the business or trade secrets or proprietary information that is designated as such; provided further, that (A) in the event a public disclosure request is made for information marked as proprietary, and if the City Attorney determines that said information may be subject to being disclosed; or (B) the City determines that the information should be disclosed in connection with its

enforcement of any provision of this title, or in the exercise of its police or regulatory powers; then the City shall notify the operator of the operator's opportunity to seek a protective order from a court with appropriate jurisdiction. In the event that a protective order is not obtained within 30 days or, if shorter, the time limitation set forth in State law, then City may disclose said information. The operator is obligated to reimburse and indemnify City for all costs, damages and attorney fees that may be awarded or assessed by the court for any actions City took at the request of operator.

16.04.4.2.3.3 A map of the general route the facility will follow; a designation of the portions of the system that will be placed above ground and the portions that will be placed underground, and the construction techniques that the operator proposes to use in installing the system above ground and underground; a schedule for construction of the facility, describing when and where construction will begin, how it will proceed, and when it will be completed; and the expected effect on right-of-way usage, including information on the ability of the public rights-of-way to accommodate the proposed system, including, as appropriate given the system proposed, an estimate of the availability of space in conduits and an estimate of the cost of any necessary rearrangement of existing facilities; provided, however, that any proprietary information required under this subparagraph as well as the preceding subparagraph shall be subject to the non-disclosure procedure prescribed in the proviso of the preceding subparagraph.

16.04.4.2.3.4 A description, where appropriate, of how services will be converted from existing facilities to new facilities, and what will be done with existing facilities.

16.04.4.2.4 A demonstration of how the applicant will reasonably meet the future cable-related needs and interests

of the community, including descriptions of the capacity, facilities and support for public, educational, and governmental use of the cable system (including institutional networks) applicant proposes to provide and why applicant believes that the proposal is adequate to meet the future cable-related needs and interests of the community.

16.04.4.2.5 A demonstration of the financial qualifications of the applicant, including at least the following:

16.04.4.2.5.1 The proposed rate structure, including projected charges for each service tier, installation, converters, and all other proposed equipment or services;

16.04.4.2.5.2 a statement regarding the applicant's financial ability to complete the construction to meet the time frame proposed and to operate the cable system proposed certified by the applicant's chief financial officer; and

16.04.4.2.5.3 Pro forma financial projections for the proposed franchise term, including a statement of projected income, and a schedule of planned capital additions, with all significant assumptions explained in notes or supporting schedules.

16.04.4.2.6 A demonstration of the applicant's technical ability to construct and/or operate the proposed cable system;

16.04.4.2.7 A demonstration that the applicant is legally qualified, which proof must include a demonstration that the applicant:

16.04.4.2.7.1 Has received, or is in a position to receive, necessary authorizations from State and Federal authorities;

16.04.4.2.7.2 Has not engaged in conduct (fraud, racketeering, violation of antitrust laws, consumer protection laws, or similar laws) that allows City to

conclude the applicant cannot be relied upon to comply with requirements of franchise, or provisions of this title;

16.04.4.2.7.3 Is willing to enter into a franchise, to pay required compensation and to abide by the provisions of applicable law, including those relating to the construction, operation or repair of its facilities; and has not entered into any agreement that would prevent it from doing so; and

16.04.4.2.7.4 The applicant must not have submitted an application for an initial or renewal franchise to the City, which was denied on the ground that the applicant failed to propose a cable system meeting the cable-related needs and interests of the community, or as to which any challenges to such franchising decision were finally resolved (including any appeals) adversely to the applicant, within three years preceding the submission of the application.

An applicant may show that it would be inappropriate to deny it a franchise under Section 16.04.4.2.7.2, by virtue of: the particular circumstances surrounding the acts or omissions at issue; the steps taken by the applicant to cure all harms flowing therefrom and to prevent their recurrence; and the lack of involvement of the applicant's principals, or the remoteness of the acts or omissions from the operation of communications systems.

16.04.4.2.8 The extent that the applicant is in any respect relying on the financial or technical resources of another person, including another affiliate, the proofs required Section 16.04.4.2.5 - Section 16.04.4.2.6 should be provided for that person.

16.04.4.2.9 A description of the applicant's prior experience in cable system ownership, construction, and operation, and identification of cities and counties in Washington in which the applicant or any of its principals have a cable franchise or any interest therein, provided that an applicant that holds a franchise for the City and is seeking renewal of

that franchise need only provide this information for other cities and counties in Washington where its franchise is scheduled to expire during the 12-month period prior to the date its application is submitted to the City and for other cities and counties in Washington where its franchise had been scheduled to expire during the 12-month period after the date its application is submitted to the City. If an applicant has no other franchise in Washington, it shall provide the information for its operations in other states.

16.04.4.2.10 An affidavit or declaration of the applicant or authorized officer thereof certifying the truth and accuracy of the information in the application, and certifying that the application meets all requirements of applicable law.

16.04.4.3 Procedure for applying for grant of a franchise, other than an application that is subject to 47 U.S.C. §546.

16.04.4.3.1 A person may apply for a franchise in response to a request for proposals ("RFP") issued by the City. Any response to an RFP shall contain the information required by Section 16.04.4.2, and such other information as the RFP may require, and must be submitted in accordance with the requirements in the RFP. A properly filed response to an RFP is subject to evaluation in accordance with Section 16.04.4.3.3. The City may conduct such investigations from time to time as may be appropriate to establish RFP requirements.

16.04.4.3.2 Notwithstanding the provisions of Section 16.04.4.3.1, a person may apply for an initial franchise by submitting an unsolicited application containing the information required in Section 16.04.4.2 and requesting an evaluation of that application pursuant to Section 16.04.4.3.3. Prior to evaluating that application, the City may conduct such investigations as are necessary to determine whether the application satisfies the standards set forth in Section 16.04.4.3.3, including by commencing a

proceeding to identify the future cable-related needs and interests of the community. It also may seek additional applications prior to evaluating the application. An applicant for an initial franchise shall be provided an opportunity to amend its application in light of the result of any investigation conducted by the City, prior to evaluation of that application pursuant to Section 16.04.4.3.3.

16.04.4.3.3 In evaluating an application for a franchise, the City may consider the following factors:

16.04.4.3.3.1 The extent to which the applicant has substantially complied with the applicable law and the material terms of any existing cable franchise for the City;

16.04.4.3.3.2 Whether the quality of the applicant's service under any existing franchise in the City, including signal quality, response to customer complaints, billing practices and the like has been reasonable in light of the needs and interests of the communities served;

16.04.4.3.3.3 Whether the applicant has the financial, technical, and legal qualifications to hold a cable franchise;

16.04.4.3.3.4 Whether the application satisfies requirements established by the City under this title or in an RFP or is otherwise reasonable to meet the future cable-related needs and interests of the community, taking into account the cost of meeting such needs and interests;

16.04.4.3.3.5 Whether, to the extent not considered as part of Section 16.04.3.3.4, the applicant will provide adequate public, educational, and governmental use capacity, facilities, or financial support thereof;

16.04.4.3.3.6 Whether issuance of a franchise is in the public interest considering the immediate and future effect on the public rights-of-way and private property that would be used by the cable system, including the extent to which installation or maintenance as planned would require

replacement of property or involve disruption of property, public services, or use of the public rights-of-way; and the comparative superiority or inferiority of competing applications; and

16.04.4.3.3.7 Whether the approval of the application may eliminate or reduce competition in the delivery of cable service in the City.

16.04.4.3.4 If the City finds that it is in the public interest to issue a franchise considering the factors set forth above, the City may adopt a franchise ordinance setting forth the terms and conditions of the franchise, which franchise shall become effective upon satisfaction of conditions precedent to effectiveness, and when signed and accepted by the applicant. If the City denies a franchise, it will cause a written explanation of the denial to issue, which may be in any appropriate form. Without limiting its authority to deny an application for a franchise, the City specifically reserves the rights to reject any application that is incomplete or fails to respond to an RFP. Nothing in this title shall be construed in any way to limit the discretion and legislative authority of the City Council in making decisions relative to the granting, denial, or renewal of a franchise.

16.04.4.4 Procedure for applying for grant of a Cable Act renewal franchise.

16.04.4.4.1 To the extent required by Federal law, requests for cable franchise renewal under the Cable Act will be received and reviewed in a manner consistent with Section 626 of the Cable Act, 47 U.S.C. § 546. It is the proposal submitted by a franchisee under 47 U.S.C. § 546(b), and not the request for commencement of the renewal proceedings submitted under 47 U.S.C. §546(a), that must contain the information required under Section 16.04.4.2.

16.04.4.4.2 If neither a franchisee nor the City activates in a timely manner, or can activate the renewal process set forth in 47 U.S.C. § 546(a)-(g) (including, for example, if the provisions are repealed), and except as to applications submitted pursuant to 47 U.S.C. § 546(h), the provisions of Section 16.04.4.3 shall apply and a renewal request shall be evaluated using the same criteria as any other request for a franchise.

16.04.4.4.3 The City may by resolution adopt procedures for conducting any proceedings required under federal law, including without limitation, procedures for presentation of evidence; and may also by resolution specify the person or entity that will conduct any administrative hearing that may be required by federal law, should the City Council decide that it does not wish to conduct the proceeding itself. In any case, however, the final decision to deny or grant renewal shall remain with the City Council.

16.04.4.5 Informal applications for renewal. Notwithstanding the above, a cable operator may submit a proposal for renewal of a franchise pursuant to 47 U.S.C. § 546(h). Such a proposal may be submitted at any time and the City may, after affording the public adequate notice and opportunity for comment, grant or deny such proposal at any time (including after proceedings have been commenced in accordance with 47 U.S.C. § 546(a)). An application may be denied for any reason.

16.04.4.6 Application for modification of a franchise.

16.04.4.6.1 An application for modification of a franchise shall include, at minimum, the following information:

16.04.4.6.1.1 The specific modification requested;

16.04.4.6.1.2 The justification for the requested modification, including the impact of the requested modification on subscribers and others, and the financial impact on the applicant if the modification is approved or

disapproved, demonstrated through, inter alia, submission of pro forma financial statements.

16.04.4.6.1.3 A statement indicating whether the modification is sought pursuant to Section 625 of the Cable Act, 47 U.S.C. § 545, and, if so, a demonstration that the requested modification meets the standards set forth in 47 U.S.C. § 545;

16.04.4.6.1.4 Any other information that the applicant believes is necessary for the City to make an informed determination on the application for modification; and

16.04.4.6.1.5 An affidavit or declaration of the applicant or applicant's authorized officer certifying the truth and accuracy of the information in the application, and certifying that the application is consistent with the requirements of applicable law.

16.04.4.6.2 A request for modification submitted pursuant to 47 U.S.C. § 545 shall be considered in accordance with the requirements of that section.

16.04.4.7 Public hearings. An applicant shall be notified of any public hearings held in connection with the evaluation of its application and shall be given a reasonable opportunity to be heard. In addition, prior to the issuance of a franchise, the City shall provide for the holding of a public hearing within the proposed franchise Area, following notice to the public, at which each applicant and its application shall be examined and the public and all interested parties afforded a reasonable opportunity to be heard. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.5 Construction provisions.

16.04.5.1 System Construction Schedule. Every franchise shall specify the construction schedule that will apply to any required construction, upgrade, or rebuild of the cable system. The schedule shall provide for prompt completion

of the project, considering the amount and type of construction required.

16.04.5.2 Use of Cable Operator's Facilities. The City shall have the right to install and maintain, free of charge upon any poles or in any conduit owned by a cable operator in the City, any wire and pole fixtures that do not unreasonably interfere with the cable system operations of the franchisee; provided that, if a franchisee is authorized to erect poles or place conduit, and the City uses a franchisee's conduit or poles to install a cable system that competes with that franchisee in the provision of cable service to residential subscribers, the franchise may provide that the franchisee may charge the City a fair market rate pursuant to that franchise for the use of the poles or conduit to provide residential cable service. Each cable operator shall notify the City when it enters into an agreement for use of its poles and conduits in the City. Copies of agreements for use of cable operator's conduits or poles in the public rights-of-way or on other public property shall be available for review upon the City's request.

16.04.5.3 Provision of Service/Quality of Service. In addition to satisfying such requirements as may be established in a franchise, every cable operator shall operate its cable system subject to the following conditions, except as prohibited by Federal law:

16.04.5.3.1 It is the policy of the City to ensure that every cable system provide service in the franchise area upon request to any person or any government building. Each cable operator shall extend service upon request within the City or (if smaller) its franchise area, provided that, a franchise may permit a franchisee to require a potential subscriber to contribute a fair share of the capital costs of installation or extension as a condition of extension or installation in cases where such extension or installation

may be unduly expensive. Service must be provided within time limits specified in Section 16.04.5.3.2.

16.04.5.3.2 Except as a franchise otherwise provides, a cable operator must extend service to any person or to any government building which requests it in the City or (if smaller) its franchise area (i) within seven days of the request, where service can be provided by activating or installing a drop; (ii) within 90 days of the request where an extension of one-half mile or less is required; or (iii) within six months where an extension of one-half mile or more is required. Provided that, in cases where a franchise permits a franchisee to require a potential subscriber to bear a share of extension or installation costs, and franchisee requires the potential subscriber to bear such costs, the time for extension shall be measured from the date the subscriber agrees to bear such costs or, if a franchisee requires prepayment of all or a portion of the estimated costs, from the date the prepayment is made. A franchisee that requires a potential subscriber to bear a portion of installation or extension costs must prepare a written estimate of extension costs within seven days of a request for an installation or extension that would be subject to cost-sharing.

16.04.5.3.3 A cable system within the City shall meet or exceed the technical standards set forth in 47 C.F.R. § 76.601 and any other applicable technical standards.

16.04.5.3.4 A cable operator shall perform all tests necessary to demonstrate compliance with the requirements of its franchise and other technical and performance standards established by applicable law. Unless a franchise or applicable law provides otherwise, all tests shall be conducted in accordance with federal rules and in accordance with the most recent edition of National Cable Television Association's "Recommended Practices for Measurements on Cable Television Systems," or such other

manual as may be directed under FCC regulations. A written report of any test results shall be filed with the City within seven days of a request by the City. If a location fails to meet technical or performance specifications, the operator, without requirement of additional notice or request from City, shall promptly take corrective action, and retest the locations.

16.04.5.3.5 Upon request of the City, every cable operator shall be required to interconnect with every other cable system and cable operator within the City on fair and reasonable terms for purposes of providing PEG and I-Net services.

16.04.5.4 System Maintenance. Scheduled maintenance shall be performed so as to minimize the effect of any necessary interruptions of cable service.

16.04.5.5 Continuity of Service. Each franchisee shall, during the term of the franchise, ensure that subscribers are able to receive continuous service. In the event the franchise is revoked or terminated, the franchisee may be required to continue to provide service for a reasonable period to assure an orderly transition of service from the franchisee to another entity. A franchise may establish more particular requirements under which these obligations will be satisfied. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.6 Operation and reporting provisions.

16.04.6.1 Communication with Regulatory Agencies. If requested by the City, a cable operator shall file with the City all reports required by the FCC including, without limitation, any proof of performance tests and results, Equal Employment Opportunity ("EEO") reports, and all petitions, applications, and communications of all types directly related to the cable system, or a group of cable systems of which the cable operator's cable system in the City is a part, submitted or received by the cable operator,

an affiliate, or any other person on the behalf of the operator, either to or from the FCC, the Security and Exchange Commission, or any other Federal or State regulatory commission or agency having jurisdiction over any matter affecting operation of the cable system; provided that, nothing herein requires a franchisee to produce regulatory or court filings that are treated by the agency or court as confidential, such as Hart-Scott-Rodino Act filings. Nothing in this Section 16.04.6.1 affects any rights the City may have to obtain books and records under Chapter 16.01.

16.04.6.2 Reports.

16.04.6.2.1 Within 45 days of the end of each calendar quarter, a cable operator shall submit a report to the City containing the following information:

16.04.6.2.1.1 The number of service calls (calls requiring a truck roll) received by type during the prior quarter, and the percentage of service calls compared to the subscriber base by type of complaint; and

16.016.04.6.2.1.2 The number and type of outages known by the operator for the prior quarter, identifying separately the following:

16.016.04.6.2.1.3 Each planned outage, the time it occurred, its duration, and the estimated area and number of subscribers affected;

16.04.6.2.1.4 Each known unplanned outage, the time it occurred, its estimated duration and the estimated area and the number of subscribers affected, and if known, the cause;

16.04.6.2.1.5 the total estimated hours of known outages as a percentage of total hours of cable system operation. an outage is a loss of sound or video on any signal, or a significant deterioration of any signal affecting two or more subscribers; and

16.04.6.2.2 No later than 90 days after the end of its fiscal year, a cable operator shall submit a written report that shall contain such information as may be required from time to time by the City, and at least the following, unless the City waives the requirement:

16.04.6.2.2.1 A summary of the previous year's activities in the development of the cable system, including descriptions of services begun or discontinued, the number of subscribers gained or lost for each category of cable service;

16.04.6.2.2.2 A summary of complaints for which records are required under Section 16.04.6.3.1, identifying both the number and nature of the complaints received and an explanation of their dispositions;

16.04.6.2.2.3 A fully audited or certified revenue report from the previous calendar year for the cable system.

16.04.6.2.2.4 An ownership report, indicating all persons who at the time of filing control or own an interest in the cable operator of 10 percent or more;

16.04.6.2.2.5 A list of officers and members of the Board of Directors of the franchisee and any affiliates directly involved in the operation or the maintenance of the cable system;

16.04.6.2.2.6 An organizational chart showing all corporations or partnerships with more than a 10 percent interest ownership in the cable operator, and the nature of that ownership interest (limited partner, general partner, preferred shareholder, etc.); and showing the same information for each corporation or partnership that holds such an interest in the corporations or partnerships so identified and so on until the ultimate corporate and partnership interests are identified;

16.04.6.2.2.7 An annual report of each entity identified in Section 16.04.6.2.2.6 which issues an annual report;

16.04.6.2.2.8 A complete report on its plant. This plant report shall state the physical miles of plant construction and plant in operation during the prior calendar year categorized as aerial and underground, identify any cases where subscribers contributed to plant extension, provide revisions to the cable system maps filed with the City, and report the results of appropriate electronic measurements to show conformity with FCC technical standards.

16.04.6.2.2.9 A report showing, for each cable customer service standard in force, the cable operator's performance with respect to that standard for each quarter of the preceding year. in each case where cable operator concludes it did not comply fully, the cable operator will describe the corrective actions it is taking to assure future compliance.

16.04.6.2.2.10 Once the information required by Sections 16.04.6.2.2.4-.6 has been filed, it need be refiled only if it changes.

16.04.6.3 Records required. A cable operator shall at all times maintain:

16.04.6.3.1 Records of all complaints received with information sufficient to allow the operator to prepare the reports required in this Section 16.04.6. The term "complaints" as used herein and throughout this ordinance refers to complaints about any aspect of the cable system or franchisee's operations, including, without limitation, complaints requiring service calls, and complaints about employee courtesy, billing, prices, programming, outages and signal quality;

16.04.6.3.2 Records of outages known to the cable operator, with information sufficient to allow a franchisee to prepare the reports required in this Section 16.04.6;

16.04.6.3.3 Records of service calls for repair and maintenance indicating the date and time service was

requested, the date of acknowledgment and date and time service was scheduled (if it was scheduled), and the date and time service was provided, and (if different) the date and time the problem was solved; and

16.04.6.3.4 Records of installation/reconnection and requests for service extension, indicating date of request, date of acknowledgment, and the date and time service was extended. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.7 Rate regulation and consumer protection.

16.04.7.1 Scope and Applicability. The City reserves all rights to implement and impose regulation of a Cable operator's rates and charges to the maximum extent permitted by law, and may do so by amendment to this ordinance, by separate ordinance, by amendment to a franchise, or in any other lawful manner.

16.04.7.2 Rate Regulation Procedures. Rate regulation shall be performed in accordance with the rules and regulations of the FCC. The City Manager may take any required steps to file complaints, toll rates, issue accounting orders or take any other steps required to comply with FCC regulations. The City Council shall be responsible for issuing rate orders that establish rates or order refunds. No rate may be put into effect without the prior review and approval of the City, except as federal law may otherwise require.

16.04.7.3 Rate discrimination prohibited . Except to the extent the City may not enforce such a requirement, a cable operator is prohibited from discriminating in its rates or charges or from granting undue preferences to any subscriber, potential subscriber, or group of subscribers or potential subscribers; provided, however, that a franchisee may offer temporary, bona fide promotional discounts in order to attract or maintain subscribers, so long as such discounts are offered on a non-discriminatory basis to similar classes of subscribers throughout the franchise area;

and a franchisee may offer discounts for the elderly, the disabled, or the economically disadvantaged; and such other discounts as it is expressly entitled to provide under federal law, if such discounts are applied in a uniform and consistent manner. A cable operator shall comply at all times with all applicable federal, state, and City laws, and all executive and administrative orders relating to non-discrimination.

16.04.7.4 Redlining prohibited. A cable system operator shall not deny access or charge different rates to any group of subscribers or potential subscribers because of the income of the residents of the local area in which such group resides.

16.04.7.5 Cable customer service standards. Each cable operator must satisfy cable customer service standards or consumer protection standards as may be set forth in its franchise. In addition, every franchise shall be deemed to include a requirement that the franchisee comply with such additional or stricter customer service standards or consumer protection laws as the City may establish from time to time by ordinance or resolution. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.8 Franchise fee.

16.04.8.1 Amount of Franchise Fee. A cable operator shall pay to the City a franchise fee in an amount equal to 5 percent of Gross Revenues, or such other amount as may be specified in the franchise; provided, however, that if the franchise specifies an amount, that amount shall be subject to increase should federal limits on fee payments be eliminated or changed and other Cable operators are subject to a higher fee. (Ord. 26053 § 1; passed April 15, 1997.)v

16.04.9 Transfers.

16.04.9.1 City Approval Required. No transfer shall occur without prior written notice to and approval of the City Council. Transfer without the prior written approval of the City shall be considered to impair the City's assurance of due performance. The granting of approval for a transfer in one instance shall not render unnecessary approval of any subsequent transfer.

16.04.9.2 Application.

16.04.9.2.1 The franchisee shall promptly notify the City of any proposed transfer involving a cable system. If any transfer should take place without prior notice to the City, the franchisee will promptly notify the City that such a transfer has occurred.

16.04.9.2.2 At least 120 calendar days prior to the contemplated effective date of a transfer involving a cable system, the franchisee shall submit to the City an application for approval of the transfer. Such an application shall provide complete information on the proposed transaction, including details on the legal, financial, technical, and other qualifications of the transferee, and on the potential impact of the transfer on subscriber rates and service. At a minimum, the following information must be included in the application, provided that, a franchisee is not required to duplicate information that it submits to the City to comply with its obligations under federal or state law:

16.04.9.2.2.1 All information and forms required under federal law or the equivalent of such forms if no longer required by federal law;

16.04.9.2.2.2 All information required in Sections 16.04.4.2.1 and 16.04.4.2.5-4.4.2.10 of this ordinance;

16.04.9.2.2.3 Any contracts or other documents that relate to the proposed transaction, and all documents, schedules, exhibits, or the like referred to therein;

16.04.9.2.2.4 Any shareholder reports or filings with the Securities and Exchange Commission ("SEC") that discuss the transaction;

16.04.9.2.2.5 other information necessary to provide a complete and accurate understanding of the financial position of the cable system before and after the proposed transfer;

16.04.9.2.2.6 Complete information regarding any potential impact of the transfer on subscriber rates and service;

16.04.9.2.2.7 A brief summary of the proposed transferee's plans for at least the next five years regarding line extension, plant and equipment upgrades, channel capacity, expansion or elimination of services, and any other changes affecting or enhancing the performance of the cable system.

16.04.9.2.3 For the purposes of determining whether it shall consent to a transfer, the City or its agents may inquire into all qualifications of the prospective transferee and such other matters as the City may deem necessary to determine whether the transfer is in the public interest and should be approved, denied, or conditioned as provided under Section 16.04.9.3. The franchisee and any prospective transferees shall assist the City in any such inquiry, and if they fail to do so, the request for transfer may be denied.

16.04.9.3 Determination by City. In making a determination as to whether to grant, deny, or grant subject to conditions an application for a transfer of a franchise under this Section 16.04.9.2, the City shall consider the legal, financial, and technical qualifications of the transferee to operate the cable system; any potential impact of the transfer on subscriber rates or services; whether the

incumbent cable operator is in compliance with its franchise and this title and, if not, the proposed transferee's commitment to cure such noncompliance; whether the transferee owns or controls any other cable system in the City, and whether operation by the transferee may eliminate or reduce competition in the delivery of cable service in the City; and whether operation by the transferee or approval of the Transfer would adversely affect subscribers, the public, or the City's interest under this title, the franchise, or other applicable law.

16.04.9.4 Transferee's agreement. No application for a transfer of a franchise subject to this Section 16.04.9 shall be granted unless the transferee agrees in writing that it will abide by and accept all terms of this title and the franchise, and that it will assume the obligations, liabilities, and responsibility for all acts and omissions, known and unknown, of the previous franchisee under this title and the franchise for all purposes, including renewal, unless the City, in its sole discretion, expressly waives this requirement in whole or in part.

16.04.9.5 Approval Does Not Constitute Waiver. Approval by the City of a transfer of a franchise pursuant to this Section 16.04.9 does not constitute a waiver or release of any of the rights of the City under this title or a franchise, whether arising before or after the date of the transfer.

16.04.9.6 Exception for intra-company transfers. Notwithstanding the foregoing, a franchise may provide that transfers to affiliates of a franchisee shall be excepted from the requirements of Section 16.04.9.1-16.04.9.2 where (1) the affiliate is wholly-owned and managed by an entity that will guarantee the performance under a franchise ; and (2) the transferee affiliate:

16.04.9.6.1 Notifies the City of the transfer at least 60 days before it occurs and, at that time provides the agreements

and warranties required by this Section 16.04.9, describes the nature of the transfer, and submits complete information describing who will have direct and indirect ownership and control of the cable system after the transfer;

16.04.9.6.2 Warrants that it has read, accepts and agrees to be bound by each and every term of the franchise and related amendment, regulations, ordinances, and resolutions then in effect;

16.04.9.6.3 Agrees to assume all responsibility for all liabilities, acts, and omissions known and unknown of its predecessor franchisees for all purposes, including renewal;

16.04.9.6.4 Agrees that the transfer shall not permit it take any position or exercise any right which could not have been exercised by its predecessor franchisees;

16.04.9.6.5 Warrants that the transfer will not substantially increase the financial burdens upon or substantially diminish the financial resources available to the franchisee (the warranty to be based on comparing the burdens upon and resources that will be available to the transferee compared to its predecessors), or otherwise adversely affect the ability of the franchisee to perform; and

16.04.9.6.6 Warrants that the transfer will not in any way adversely affect the City or subscribers (including by increasing rates);

16.04.9.6.7 Notifies the City that the transfer is complete within five business days of the date the transfer is complete; and

16.04.9.6.8 Agrees that the transfer in no way affects any evaluation of its legal, financial or technical qualifications that may occur under the franchise or applicable law after the transfer, and does not directly or indirectly authorize any additional transfers. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.10 Connections to cable system; use of antennae.

16.04.10.1 Subscriber Right To Attach. To the extent consistent with federal law, subscribers shall have the right to attach VCR's, receivers, and other terminal equipment to a franchisee's cable system. subscribers also shall have the right to use their own remote control devices and converters, and other similar equipment.

16.04.10.2 Removal Of Existing Antennae. A franchisee shall not, as a condition of providing service, require a subscriber or potential subscriber to remove any existing antenna, or disconnect an antenna except at the express direction of the subscriber or potential subscriber, or prohibit installation of a new antenna, provided that such antenna is connected with an appropriate device and complies with applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.11 Discrimination prohibited.

16.04.11.1 A cable system operator shall not discriminate among persons or the City or take any retaliatory action against a person or the City because of that entity's exercise of any right it may have under federal, state, or local law, nor may the operator require a person or the City to waive such rights as a condition of taking service.

16.04.11.2 A cable system operator shall not refuse to employ, discharge from employment, or discriminate against any person in compensation or in terms, conditions, or privileges of employment because of race, color, creed, national origin, sex, age, disability, religion, ethnic background, or marital status. A cable system operator shall comply with all federal, state, and local laws and regulations governing equal employment opportunities, as the same may be from time to time amended. (Ord. 26053 § 1; passed April 15, 1997.)

16.04.12 Cable service, liquidated damages.

16.04.12.1 Liquidated Damages. Because a cable franchisee's failure to comply with the provisions of this title concerning cable service will result in injury to the City, and because it may be difficult to estimate the extent of each such injury, each cable franchise shall contain provisions for liquidated damages for the following violations, which provisions represent the best estimate of the damages resulting from injuries of specific types. The amounts of the liquidated damages set forth in this title are in 1997 dollars and shall be increased each year by the increase in the U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index for Pacific Cities and U.S. City Average, Seattle, Urban Wage Earners and Clerical Workers Second Half Yearly Report; unless a franchise provides otherwise, the amount of liquidated damages shall be:

16.04.12.1.1 For failure to substantially complete construction in accordance with the franchise: $1.00 per day for each affected subscriber for each day the violation continues;

16.04.12.1.2 For transferring the franchise without approval: $500 per day for each violation for each day the violation continues;

16.04.12.1.3 For failure to comply with requirements for public, educational and governmental use of the System: $500 per day for each violation for each day the violation continues;

16.04.12.1.4 For violation of customer service standards: $500 per violation except that, for violations of applicable customer service standards for which the operator's compliance is not measured in terms of its response to individual customers, $1,250 per month for any period

during which it fails to meet applicable performance standards; and

16.04.12.1.5 For all other material violations of the franchise Agreement for which actual damages may not be ascertainable: $500 per day for each violation for each day the violation continues.

16.04.12.2 Procedures applicable to liquidated damages. Before it imposes liquidated damages:

16.04.12.2.1 The City shall provide the franchisee 30 days written notice and opportunity to fully cure the defect in performance, challenge the existence of the defect, or show that the defect in performance should be excused either temporarily or permanently; and

16.04.12.2.2 The City shall (at any time after the close of the 30-day period) hold a hearing at which the franchisee shall be provided an opportunity to be heard by the City Council.

Provided that, the franchisee may waive the public hearing requirement, and if so, the City may impose liquidated damages without holding that hearing. The conclusion of the process provided for in Sections 16.04.12.2.1 and 16.04.12.2.2 satisfies the City's obligation to provide notice before drawing upon the Security Fund. Written notice shall be provided by certified mail.

16.04.12.3 Revocation or termination of franchise.

16.04.12.3.1 In addition to all other rights of the City under a cable franchise, the City shall have the right to revoke the franchise: for the reasons specified in this title; for defrauding or attempting to defraud the City or subscribers; if the franchisee abandons the cable system, or willfully refuses to provide service to the City or any part of the City in accordance with its franchise; and as otherwise provided herein.

16.04.12.3.2 Failure to complete any system upgrade required by its franchise by the prescribed date so that at least 75 percent of all plant miles are rebuilt and are serving subscribers from the upgraded system will result in the automatic forfeiture of the franchise if (a) the City has provided the franchisee with notice that the upgrade must be completed, and (b) the upgrade is not completed within 90 days after the date on which the City provides notice so that at least 75 percent of all plant miles are rebuilt and are serving subscribers.

16.04.12.4 Remedies Cumulative. All remedies under this title and franchises granted hereunder are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve the franchisee of its obligations to comply with its franchise. Remedies may be used singly or in combination; in addition, the City may exercise any rights it has at law or equity. Except that, the City is not entitled to recover damages for the same injury under two separate sections where doing so would result in a double recovery.

16.04.12.5 Relation To Insurance And Indemnity Requirements. Recovery by the City of any amounts under insurance, the construction/performance bond, the letter of credit, or otherwise does not limit the franchisee's duty to indemnify the City in any way; nor shall such recovery relieve the franchisee of its obligations under the franchise, limit the amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.05

PRIVATE COMMUNICATIONS FACILITIES

Sections:

16.05.1 Application for License.

16.05.2 Conditions of License.

16.05.3 Compensation.

16.05.1 Application for License.

A person wishing to construct, emplace, operate, replace, reconstruct, or maintain a private communications system in a public right-of-way must obtain a license therefor. The license shall only authorize placement of the system in a specific portion of the public rights-of-way for a limited and specific purpose in connection with the person's business but not encompassing in whole or in part the carriage of telecommunications for hire in the public rights-of-way, and for a limited period of time. Such application must be in the form provided for by regulation and must be accompanied by a filing fee, as may be fixed by regulation, promulgated from time-to-time by the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.05.2 Conditions of License.

Any license shall be subject to such conditions as the City may from time to time establish, shall be expressly subordinate to the use of the public rights-of-way by operators of communications facilities, and shall otherwise conform to the requirements of this title. Subject to the foregoing, the provisions of Chapter 16.01, Sections 16.01.6.1-16.01.6.5 shall apply to a private communications system as if it were a communications facility. (Ord. 26053 § 1; passed April 15, 1997.)

16.05.3 Compensation.

The owner of a private communications system shall pay a fee established by the City from time to time to reflect the fair market value of the property used. (Ord. 26053 § 1; passed April 15, 1997.)

Chapter 16.06

MISCELLANEOUS

Sections:

16.06.1 Captions.

16.06.2 Calculation of time.

16.06.3 Severability.

16.06.4 Cable customer service standards.
- 16.06.4.1 Telephone and office availability
- 16.06.4.2 Scheduling work
- 16.06.4.3 Notice to subscribers
- 16.06.4.4 Interruptions of service
- 16.06.4.5 Billing
- 16.06.4.6 Disconnection/downgrades
- 16.06.4.7 Deposits
- 16.06.4.8 Parental control option

16.06.5 Cable customer service standards - relation to other standards.

16.06.6 Customer service waiver.

16.06.1 Captions.

The captions to sections throughout this title are intended solely to facilitate reading and reference to the sections and provisions of this title. Such captions shall not affect the

meaning or interpretation of this title. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.2 Calculation of time.

Unless otherwise indicated, when the performance or doing of any act, duty, matter, or payment is required under this title or any franchise, and a period of time or duration for the fulfillment of doing thereof is prescribed and is fixed herein, the time shall be computed so as to exclude the first and include the last day of the prescribed or fixed period of duration time. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.3 Severability.

If any term, condition, or provision of this title shall, to any extent, be held to be invalid or unenforceable by a valid order of any court or regulatory agency, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding on the franchisee and the City. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.4 Cable customer service standards.

16.06.4.1 Standards.

16.06.4.1.1 Telephone and office availability.

16.06.4.1.1.1 Each franchisee shall maintain an office at a convenient location in the City that shall be open for walk-in traffic at least ten hours per day (except legal holidays) Monday through Friday, with some evening hours, and at least five hours on Saturday to allow subscribers to pay bills, to drop off equipment and to pick up standard analog converters. Each franchisee shall perform service calls, installations, and disconnects at least ten hours per day Monday through Saturday, except legal holidays provided

that a franchisee shall respond to outages 24 hours per day, seven days per week. Each franchisee shall establish a publicly listed local toll-free telephone number. The phone must be answered by customer service representatives at least ten hours per day, Monday through Saturday, except legal holidays, for the purpose of receiving requests for service, inquiries, and complaints from subscribers. After such business hours the phone shall be answered so that customers can register complaints and report service problems on a 24 hour per day, seven day per week basis, and so that the franchisee can respond to service outages as required herein. Phones shall be answered in accordance with Section 16.06.4.1.1.2 hereof.

16.06.4.1.1.2 Telephone answering time shall not exceed 30 seconds or four rings, and the time to transfer the call to a customer service representative (including hold time) shall not exceed an additional 30 seconds. Under normal operating conditions, this standard shall be met 90 percent of the time, measured quarterly. Under normal operating conditions customers will receive a busy signal less than 3 percent of the time. When the business office is closed, an answering machine or service capable of receiving and recording service complaints and inquiries shall be employed. The after-hours answering service shall comply with the same telephone answer time standard set forth in this Section 16.06.4.1.1.2.

16.06.4.1.2 Scheduling work.

16.06.4.1.2.1 All appointments for service, installation, or disconnection shall be specified by date. Each franchisee shall specify a specific time at which the work shall be done, or offer a choice of time blocks, which shall not exceed four hours in length. A franchisee may also, upon request, schedule service installation calls outside normal business hours, for the express convenience of the customer. If at any time an installer or technician is

running late for an appointment and believes it will not be able to make a scheduled appointment time, an attempt to contact the customer will be made prior to the time of appointment and the appointment rescheduled at a time convenient to the customer, if rescheduling is necessary. It is the operator's burden to prove it met the appointment.

16.06.4.1.2.2 The franchisee shall offer and fully describe to subscribers who have experienced a missed appointment (where the missed appointment was not the subscriber's fault) that the subscriber may choose between the following options: installation or service call free of charge, if the appointment was for an installation or service call for which a fee was to be charged; one month of the most widely subscribed to Service Tier free of charge if an installation or service call was to have been provided free of charge; or one month of such service free of charge for other appointments.

16.06.4.1.2.3 With regard to disabled or handicapped customers, upon subscriber request, each franchisee shall arrange for pickup and/or replacement of converters or other franchisee equipment at the subscriber's address or by a satisfactory equivalent (such as the provision of a postage-prepaid mailer).

16.06.4.1.2.4 Under normal operating conditions, requests for service, repair, and maintenance must be acknowledged by a trained customer service representative within 24 hours, or prior to the end of the next business day, whichever is earlier. A franchisee shall respond to all other inquiries (including billing inquiries) within five business days of the inquiry or complaint. Under normal operating conditions, repairs and maintenance for outages or service interruptions must be completed within 24 hours after the outage or interruption becomes known to franchisee where the franchisee has adequate access to facilities to which it must have access in order to remedy the problem. Under

normal operating conditions, work to correct all other service problems must be begun by the next business day after notification of the service problem, and must be completed within five business days from the date of the initial request. When normal operating conditions do not exist, a franchisee shall complete the work in the shortest time possible. The failure of the franchisee to hire sufficient staff or to properly train its staff shall not justify a franchisee's failure to comply with this provision.

16.06.4.1.2.5 A franchisee shall not cancel a service or installation appointment with a customer after the close of business on the business day preceding the scheduled appointment.

16.06.4.1.2.6 Under normal operating conditions, the standards of Sections 16.06.4.1.2.4 and 16.06.4.1.2.5 shall be met at least 95 percent of the time, measured on a quarterly basis.

16.06.4.1.2.7 Under normal operating conditions, the installation time standard in Title IV, Section 1.5.3.2, and below will be met no less than 95 percent of the time measured on a quarterly basis:

Requests for additional outlets, service upgrades or other connections (e.g., DMX, VCR, A/B switch) separate from the initial installation will be performed within seven business days after an order has been placed.

16.06.4.1.3 Notice to subscribers.

16.06.4.1.3.1 A franchisee shall provide each subscriber at the time service is installed, clear and accurate written information: on placing a service call, filing a complaint, or requesting an adjustment (including when a subscriber is entitled to refunds for outages and how to obtain them); showing the telephone number of the City office responsible for administering the franchise; providing a schedule of rates and charges, channel positions, services

provided, a copy of the service contract, delinquent subscriber disconnect and reconnect procedures; notifying subscribers of the availability of parental control devices; and describing any other of the franchisee's policies in connection with its subscribers. The same information shall be provided to the subscriber annually thereafter, except another copy of the service contract need not be provided. Copies of the notices provided to the subscribers shall be provided to the City. Except as applicable federal, state and local rate regulations may provide to the contrary, a franchisee shall provide the City Manager at least 60 days' notice and all subscribers at least 30 days' notice of any significant changes in the information required to be provided under this Section 16.06.4.1.3. Such notice shall be made in writing.

16.06.4.1.3.2 Each franchisee shall take appropriate steps to ensure that all written franchisee promotional materials, announcements, and advertising of residential cable service to subscribers and the general public, where price information is listed in any manner, clearly and accurately discloses price terms. In the case of telephone orders, a franchisee shall take appropriate steps to ensure that price terms are clearly and accurately disclosed to potential customers in advance of taking the order.

16.06.4.1.3.3 Each franchisee shall maintain a file open for public inspection containing all notices provided to subscribers under these customer service standards, as well as all promotional offers made to subscribers. The notices and offers shall be kept in the file for at least one year from the date of such notice or promotional offer.

16.06.4.1.4 Interruptions of service. A franchisee shall provide 48 hours prior notice to subscribers and the City before interrupting service for planned maintenance or construction; provided, however, that planned maintenance that does not require more than two hours' interruption of

service and that occurs between the hours of 12:00 midnight and 6:00 a.m. shall not require such notice to subscribers, and notice to the City must be given no less than 24 hours prior to the anticipated service interruption.

16.06.4.1.5 Billing.

16.06.4.1.5.1 A franchisee's first billing statement after a new installation or service change shall be prorated as appropriate and shall reflect any security deposit.

16.06.4.1.5.2 A franchisee's billing statement must be clear, concise and understandable, must itemize each category of service and equipment provided to the subscriber and must state clearly the charge therefor.

16.06.4.1.5.3 A franchisee's billing statement must show a specific payment due date not earlier than the later of (1) 15 days after the date the statement is mailed; or (2) the 15th day of the 30-day period in which the service being billed is rendered. A late fee or administrative fee may not be imposed for payments before the due date. subscribers shall not be charged a late fee or otherwise penalized for any failure by a franchisee, including failure to timely or correctly bill the subscriber, or failure to properly credit the subscriber for a payment timely made.

16.06.4.1.5.4 A franchisee's bill must permit a subscriber to remit payment by mail or in person at the franchisee's local office.

16.06.4.1.5.5 The account of any subscriber shall be credited a prorated share of the monthly charge for the service upon subscriber request if a subscriber is without service or if service is substantially impaired for any reason for a period exceeding four hours during any 24 hour period; or automatically if the loss of service or impairment is for 24 hours or longer; except where it can be documented that a subscriber will obtain a refund for a loss of service or impairment which was caused by the subscriber or by

subscriber-owned equipment (not including, for purposes of this Section, in-home wiring installed by the franchisee).

16.06.4.1.5.6 Franchisee shall respond to all written billing complaints from subscribers within 30 days.

16.06.4.1.5.7 Refunds to subscribers shall be issued no later than (i) the earlier of the subscriber's next billing cycle following resolution of the refund request, or 30 days; or (ii) the date of return of all equipment to franchisee, if cable service has been terminated.

16.06.4.1.5.8 Credits for cable service shall be issued no later than the subscriber's next billing cycle after the determination that the credit is warranted.

16.06.4.1.6 Disconnection/Downgrades.

16.06.4.6.1 A subscriber may terminate service at any time.

16.06.4.1.6.2 A franchisee shall promptly disconnect from the franchisee's cable system or downgrade any subscriber who so requests. No period of notice prior to voluntary termination or downgrade of cable service may be required of subscribers by any franchisee. Charges for any voluntary disconnection, and any downgrade charges shall conform to applicable law.

16.06.4.1.6.3 Any security deposit and/or other funds due a subscriber that disconnects or downgrades service shall be returned to the subscriber within 30 days or in the next billing cycle, whichever is later, from the date disconnection or downgrade was requested except in cases where the subscriber does not permit the franchisee to recover its equipment, in which case the amounts owed shall be paid to subscribers within 30 days of the date the equipment was recovered, or in the next billing cycle, whichever is later.

16.06.4.1.6.4 A franchisee may not disconnect a subscriber's cable service for non-payment unless:

16.06.4.1.6.4.1 The subscriber is delinquent in payment for cable service;

16.06.4.1.6.4.2 A separate, written notice of impending disconnection, postage prepaid, has been sent to the subscriber at least 20 days prior to the date on which service may be disconnected, at the premises where the subscriber requests billing, which notice must state the date by which disconnection may occur, and the amount the subscriber must pay to avoid disconnection;

16.06.4.1.6.4.3 The subscriber has failed to pay the amounts owed to avoid disconnection by the date of disconnection; and

16.06.4.1.6.4.4 No pending inquiry exists regarding the bill to which franchisee has not responded in writing.

Payment is not delinquent until the fifteenth day of the month in which the service being billed for is rendered; the notice required under (ii) may not be sent to a subscriber prior to the delinquency date. If the subscriber pays all amounts due, including late charges, before the date scheduled for disconnection, the franchisee shall not disconnect service. After lawful disconnection, except in cases where disconnection is also subject to 16.01.6.5, upon payment by the subscriber in full of all proper fees or charges, including the payment of the reconnection charge, if any, the franchisee shall promptly reinstate service.

16.06.4.1.6.5 A franchisee may immediately disconnect a subscriber if (i) the subscriber is damaging, destroying, or unlawfully tampering with or has damaged or destroyed or unlawfully tampered with the franchisee's cable system; (ii) the subscriber is not authorized to receive a service, and is facilitating, aiding or abetting the unauthorized receipt of service by others; or (iii) subscriber-installed or attached equipment is resulting in signal leakage which is in violation of FCC rules, provided the subscriber has failed to

correct the leakage within three business days after receiving written notice of the problem from the franchisee. After disconnection, the franchisee shall restore service after the subscriber provides adequate assurance that it has ceased the practices that led to disconnection, and paid all proper fees and charges, including any reconnect fees and all amounts owed the franchisee for damage to its cable system or equipment.

16.06.4.1.6.6 Except as Federal or State law may otherwise provide, a franchisee may remove its property from a subscriber's premises within 30 days of the termination of service. If a franchisee fails to remove its property in that period, the property shall be deemed abandoned unless the franchisee has been denied access to the subscriber's premises, or the franchisee has a continuing right to occupy the premises under Federal or State statutes.

16.06.4.1.7 Deposits. A franchisee may require a reasonable, non-discriminatory deposit on equipment provided to subscribers. deposits shall be placed in an interest-bearing account, and the franchisee shall return the deposit, plus interest earned to the date the deposit is returned to the subscriber, less any amount the franchisee can demonstrate should be deducted for damage to such equipment.

16.06.4.1.8 Parental control option. Without limiting a franchisee's obligations under Federal law, a franchisee must provide parental control devices at no charge to all subscribers who request them that enable the subscriber to block the video and audio portion of any channel or channels of programming. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.5 Cable customer service standards -- relation to other standards.

Nothing in these standards shall be read to relieve a cable operator of an obligation to comply with federal, state or local consumer protection laws, to relieve an operator of an obligation to comply with stricter cable customer service standards, or to foreclose remedies that may be available to subscribers under applicable law. (Ord. 26053 § 1; passed April 15, 1997.)

16.06.6 Customer service waiver.

The City Manager may grant a waiver of any or all of the customer service standards set out in Section 16.06.4 for a specified period of time, not to exceed two years if the City Manager finds (a) that application of a standard to a particular cable system is unnecessary or inappropriate because of the characteristics of the cable system (including size, or number of subscribers); and (b) the operator is willing to be bound by any alternative standards that the City Manager determines is necessary to provide adequate protection to subscribers. The waiver may be extended after a hearing reviewing the adequacy of the operator's customer service. (Ord. 26053 § 1; passed April 15, 1997.)

TITLE 20
TELECOMMUNICATIONS AND OTHER COMMERCIAL UTILITIES

CHAPTERS:

20.02 General Provisions
20.04 Public Way Agreements
20.06 Franchise
20.08 Facilities Lease
20.10 Conditions of Public Way Agreements, Franchises, and Facilities Leases
20.12 Open Video Systems (OVS)

CHAPTER 20.02
GENERAL PROVISIONS

Sections:

20.02.010 Purpose.
20.02.020 Definitions.
20.02.030 Business registration required.
20.02.040 Public way agreement required.
20.02.050 Franchise required.
20.02.060 Cable television franchise required.
20.02.070 Facilities lease required.
20.02.080 Construction permit required.
20.02.090 Application to existing franchise ordinances, agreements, leases, and permits and effect of other laws.
20.02.100 Reserved.
20.02.110 Fees and compensation not a tax.
20.02.120 Taxes are not to be a credit.

20.02.010 Purpose.

The purpose and intent of this title is to:

A. Establish a local policy concerning regulation of telecommunications carriers, operators, providers, and

other commercial utilities in public ways and on city and/or public property;

B. Establish, consistent with federal and state law, clear local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of activities of telecommunications carriers, operators, providers, and other commercial utilities in public ways and on city and/or public property;

C. Promote competition in telecommunications;

D. Minimize unnecessary local regulation of telecommunications carriers, operators, providers, and other commercial utilities;

E. Encourage the provision of advanced and competitive telecommunications services on the widest possible basis to the businesses, institutions and residents of the city;

F. Permit and manage reasonable access to the public ways of the city for telecommunications purposes on a competitively neutral basis;

G. Conserve the limited physical capacity of the public ways held in public trust by the city;

H. Assure that the city's current and ongoing costs of granting and regulating private access to and use of the public ways are fully paid by the persons seeking or using such access and causing such costs;

I. To the extent permitted by federal and state law, secure fair and reasonable compensation to the city and the residents of the city for permitting private use of the public ways;

J. Assure that all telecommunications carriers, operators, providers, and other commercial utilities utilizing public ways or city or public property within the city comply with the ordinances, rules and regulations of the city;

K. Assure that the city can continue to fairly and responsibly protect the public health, safety and welfare; and

L. Enable the city to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.020 Definitions.

For the purpose of this title, and the interpretation and enforcement thereof, the following words and phrases shall have the following meanings, unless the context of the sentence in which they are used shall indicate otherwise:

"The Act" means the Federal Telecommunications Act, January 31, 1996.

"Addressability" means the ability of a telecommunications system to allow telecommunications carriers, operators, or providers to authorize by remote control customer terminals to receive, change, or to cancel any or all specified programming.

"Affiliate" means an entity which (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership with franchisee. For purposes of this definition, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

"Applicant" means any person or entity that applies for any public way agreement, franchise, lease, or permit pursuant to this title.

"Cable facilities" means equipment and wiring used to transmit audio and video signals to subscribers.

"Cable operator" means a telecommunications carrier providing or offering to provide "cable service" within the city as that term is defined in the Cable Act and Chapter 13.36 ACC.

"Cable service" for the purpose of this title shall have the same meaning provided by the Cable Act and Chapter 13.36 ACC.

"Cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service and other service to subscribers.

"Carrier" means any provider of telecommunications services, except that this term does not include aggregators of telecommunications services as defined in Section 225 of the Act. (See also "Telecommunications carrier".)

"City" means the city of Auburn, Washington as defined in ACC 1.04.010 to include all future areas annexed into the city.

"City property" means and includes all real property owned by the city, other than public ways and utility easements as those terms are defined herein, and all property held in a proprietary capacity by the city, which are not subject to public way agreements and franchising as provided in this title.

"Commercial utility provider" means any natural gas, electric power, pipeline, or other company desiring to utilize city public ways for transporting, purveying, or delivering bulk products, or providing commercial power or gas services within the city, or needing to transport bulk product or services through the city to other destinations for commercial purposes.

"Council" means the city council of the city of Auburn, Washington acting in its official capacity constituting the legislative body of the city.

"Data communication" means (1) the transmission of encoded information or (2) the transmission of data from one point to another.

"Dwelling units" means residential living facilities as distinguished from temporary lodging facilities such as hospitals, hotel and motel rooms and dormitories, and includes single-family residential units and individual apartments, condominium units, mobile homes, extended care facilities and other multiple-family residential units.

"Emergency" means a condition of imminent danger to the health, safety, and welfare of property or persons located within the city including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots or wars.

"Excess capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the public way that is or will be available for use for additional telecommunications facilities.

"FCC" or "Federal Communications Commission" means the federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

"Fiber optics" means the technology of guiding and projecting light for use as a communications medium.

"Franchise" shall mean the initial authorization, or renewal thereof, approved by an ordinance of the city, which authorizes the franchisee to construct, install, operate, or maintain telecommunications or other commercial utility facilities in, under, over, or across public ways of the city and to also provide service to persons or areas in the city.

"Franchise area" means all areas within the current city limits and within any future adjusted boundaries of the city limits. The effective date of any such changes in the city limits will be the effective date(s) of any future annexations.

"Franchisee" means a person, as defined herein, firm or corporation to whom or which a franchise, as defined in this section, is granted by the council under this title and the lawful successor, transferee or assignee of said person, firm or corporation subject to such conditions as may be defined in the franchise and in this title.

"Grantee" means a holder of a public way agreement, franchise, or lease approved by the city council of the city of Auburn.

"Gross revenue" shall mean all receipts accrued in a franchisee's books for all commercial utility, communications and communications-related operations and services from subscribers, who have a service address within the corporate limits of the city of Auburn, to

franchisee's business as well as any other revenue arising from operation or possession of a franchise agreement with the city of Auburn, less the application and administrative fees mandated in the franchise agreement and the franchise fee intended for compensation for use of "public ways". By way of example, but without limitation, "gross revenue" includes all revenues from the sale or lease of equipment, installation charges to subscribers who have service addresses within the corporate limits of the city, charges to customers, subscribers and other users of the telecommunications system who have service addresses within the corporate limits of the city. "Gross revenues" does not include: (a) taxes, fees, or assessments of any kind or description imposed on or levied against franchisee which are not applicable to all other persons or entities doing business within the city, (b) revenues noncollectible from customers (bad debts) which have been written off through generally accepted accounting practices, (c) discounts, and (d) any applicable exclusions under the law.

"Lessee" means the holder of a lease for use of city or public property which has been approved by the city council of the city of Auburn.

"Other ways" means the highways, streets, alleys, utility easements or other rights-of-way within the city, but under the jurisdiction and control of a governmental entity other than the city.

"Overhead facilities" means utility poles, utility facilities and telecommunications or other commercial utility facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

"OVS" means open video system which is a telecommunications system having two-thirds of its capacity set aside for use by other providers, programmers, or competitive business on a subleasing basis. Because of its self-competitive nature, an OVS is subject to regulatory restrictions.

"Person" means and includes corporations, companies, associations, joint stock companies or associations, firms, partnerships, limited liability companies and individuals and includes their lessors, trustees and receivers.

"Property of franchisee" means all plant, or facilities owned, installed or used by a franchisee in the conduct of its business in the city under the authority of a franchise granted pursuant to this title.

"Proposal" means an application by any person or entity that applies for any public way agreement, franchise, lease, or permit pursuant to this title.

"Public place" means an area generally open to public access including all public ways, parks, plazas, publicly owned buildings, theaters, and entrances or doorways to places of business that front on a public way.

"Public street" means any highway, street, alley or other public right-of-way for motor vehicle travel under the jurisdiction and control of the city which has been acquired, established, dedicated or devoted to highway purposes.

"Public way(s)" shall mean the surface, the air space above the surface, and the space below the surface of any public street, including, but not limited to, any public alley, bridge, land path, trail, court, circle, roundabout, boulevard, drive, tracts, right-of-way or sidewalk under the

jurisdiction of the city as is now, or in the future, laid out, improved or unimproved within the limits of the city presently and as such limits may be hereafter extended.

"State" means the state of Washington.

"Subscriber" or "customer" means a person or user of the commercial utility or telecommunications system who lawfully receives commercial utility or communications services or other service therefrom with franchisee's express permission.

"Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by federal or state law, orders, and regulations, to allow its use by a telecommunications carrier for a pole attachment.

"Telecommunications carrier" means and includes every person that directly or indirectly owns, controls, operates or manages plant, equipment or facilities within the city's public ways, for the purpose of offering telecommunications services within the city. (See also "Carrier".)

"Telecommunications facilities" means the plant, equipment and facilities, including but not limited to, cables, wires, conduits, ducts, pedestals, antennae, electronics and other appurtenances used or to be used to transmit, receive, distribute, provide or offer telecommunications services.

"Telecommunications operator" means and includes every person who provides telecommunications services within the city over telecommunications facilities located within

the city's public ways, without any ownership, management or control of the facilities.

"Telecommunications provider" means and includes every person who utilizes facilities within the city's public ways to provide services outside the city only.

"Telecommunications service" means the providing or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of voice, data, image, graphic and video programming information between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities, with or without benefit of any closed transmission medium.

"Telecommunications system," see "Telecommunications facilities."

"Underground facilities" means utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for overhead facilities.

"Usable space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in any federal or state orders and regulations.

"Utility easement" means any easement in which the city holds an interest in or an interest has been acquired, established, dedicated or devoted for city utility purposes.

"Utility facilities" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within

the public ways of the city and used or to be used for the purpose of providing utility or telecommunications services.

"WUTC" means the Washington State Utility and Transportation Commission. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.030 Business registration required.
Except as otherwise provided herein, all commercial utilities, cable operators, telecommunications carriers, operators and providers engaged in the business of transmitting, supplying or furnishing of commercial utility or telecommunications service of any kind originating or terminating in the city, or utilizing facilities within the city's public ways to provide services exclusively outside of the city only, shall apply for and obtain a business registration from the city pursuant to Chapter 5.84 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.040 Public way agreement required.
Except as otherwise provided herein, any commercial utility or telecommunications provider who desires to construct, install, operate, maintain, or otherwise locate facilities in, under, over or across any public way of the city for the sole purpose of providing service to persons and areas outside the city shall first obtain a public way agreement granting the use of such public ways from the city pursuant to Chapter 20.04 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.050 Franchise required.
Except as otherwise provided herein, any commercial utility, telecommunications carrier or operator who desires to construct, install, operate, maintain or otherwise locate facilities in, under, over or across any public way of the

city, and to also provide service to persons or areas in the city, shall first obtain a franchise granting the use of such public ways from the city pursuant to Chapter 20.06 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.060 Cable television franchise required.
Except as otherwise provided herein, any telecommunications carrier or other person who desires to construct, install, operate, maintain or locate cable or telecommunications facilities in any public way in the city for the purpose of providing cable service to persons in the city shall first obtain a cable franchise from the city pursuant to Chapter 13.36 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.070 Facilities lease required.
No commercial utility, telecommunications carrier or other entity who desires to locate facilities or other equipment on city property shall locate such facilities or equipment on city property unless granted a facilities lease from the city pursuant to Chapter 20.08 ACC. The city council reserves unto itself the sole discretion to lease city property for telecommunications and other facilities, and no vested or other right shall be created by this section or any provision of this title applicable to such facilities leases. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.080 Construction permit required.
Except as otherwise provided herein, the holder of a public way agreement, franchise, or lease granted pursuant to this title, and the holders of cable franchises granted pursuant to Chapter 13.36 ACC, shall, in addition to said public way agreement, franchise, or lease, be required to obtain a construction permit from the city pursuant to Chapter 12.24 ACC. No work, construction, development, excavation, or installation of any equipment or facilities shall take place

within the public ways or upon city property until such time as the construction permit is issued. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.090 Application to existing franchise ordinances, agreements, leases, and permits and effect of other laws.

All grantees, franchisees, and lessees subject to this title are at all times subject to and must comply with all applicable existing and future federal, state and local laws, ordinances, codes, rules, regulations and orders.

A. This title shall have no effect on agreements in effect prior to adoption, unless otherwise provided, in any existing franchise ordinance, franchise agreement, lease, permit, agreement or other authorization to use or occupy a public way in the city until:

1. The expiration of said franchise ordinance, agreement, lease, permit, or authorization; or

2. The amendment to an unexpired franchise ordinance, franchise agreement, lease, permit, authorization, or agreement unless both parties agree to defer full compliance to a specific date not later than the expiration date provided therein.

B. Nothing in this title shall be deemed to create an obligation upon any person for which the city is forbidden to require pursuant to federal, state, or other law.

C. Upon expiration of the electrical and natural gas franchises in effect at time of adoption of this title, granted by Chapter 13.44 ACC, the franchise shall be renegotiated under the terms of this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.100 Reserved.
(Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.110 Fees and compensation not a tax.
The fees, charges and fines provided for in this title and any compensation charged and paid as provided herein, whether fiduciary or in-kind, are separate from, and additional to, any and all federal, state, local, and city taxes as may be levied, imposed or due from a commercial utility, telecommunications carrier, operator, or provider, its customers or subscribers or on account of the lease, sale, delivery or transmission of telecommunications services. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.02.120 Taxes are not to be a credit.
Any compensation paid as provided for in public way agreements, franchises, and/or facility leases shall be exclusive of and in addition to all special assessments and taxes of whatever nature which are applicable to all other persons or entities doing business within the city, including, but not limited to, ad valorem taxes, sales taxes, corporate or business occupation taxes or other taxes or fees imposed or levied by any governmental entity. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

CHAPTER 20.04
PUBLIC WAY AGREEMENTS

Sections:

20.04.010 Public way agreements.
20.04.020 Public way agreement applications.
20.04.030 Notice of complete application and scheduling of public hearing.
20.04.040 Determination by the city.
20.04.050 Notification of council action and execution of agreement.

20.04.060	Nonexclusive public way agreements.
20.04.070	Rights granted.
20.04.080	Term of telecommunications public way agreements.
20.04.090	Specified route.
20.04.100	Service to city users.
20.04.110	Amendment to public way agreements.
20.04.120	Renewal of public way agreements.
20.04.130	Determination by city for renewal of public way agreements.
20.04.140	Notification of council action on renewal of public way agreements and execution of agreements.
20.04.150	Obligation to cure as a condition of renewal.
20.04.160	Reserved.
20.04.170	Annual fee for recovery of city costs.
20.04.180	Other city costs.

20.04.010 Public way agreements.

A public way agreement shall be required of any commercial utility or telecommunications provider who desires to occupy specific public ways of the city for the sole purpose of providing commercial utility or telecommunications services to persons or areas outside the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.020 Public way agreement applications.

Any person that desires a public way agreement pursuant to this title shall file an application with the city which shall include the following information:

A. The identity of the applicant, including all affiliates of the applicant;

B. A description of the commercial utility or telecommunications services that are or will be offered or provided by the applicant using its facilities;

C. A description of the transmission medium or transporting means that will be used by the applicant to offer or provide such telecommunications or utility services;

D. Preliminary engineering plans, specifications and a network map of the facilities to be located within the city, all in sufficient detail to identify:

1. The location and route requested for applicant's proposed facilities;

2. The location of all overhead and underground public utility, telecommunication, cable, water, sewer drainage and other facilities in the public way along the proposed route;

3. The location(s), if any, for interconnection with the utility or telecommunications facilities of other utility or telecommunications carriers, operators, and providers; and

4. The specific trees, structures, improvements, facilities and obstructions, if any, that applicant proposes to temporarily or permanently remove or relocate;

E. If applicant is proposing to install aboveground and/or overhead facilities:

1. Evidence that surplus space is available for locating its utility or telecommunications facilities on existing utility poles along the proposed route;

2. Proof of compliance with city's zoning code; and

3. Demonstrate compatibility with existing and future street illumination systems;

F. If applicant is proposing an underground installation in existing ducts or conduits within the public ways, information in sufficient detail to identify:

1. The excess capacity currently available in such ducts or conduits before installation of applicant's utility or telecommunications facilities;

2. The excess capacity, if any, that will exist in such ducts or conduits after installation of applicant's utility or telecommunications facilities;

3. Evidence of ownership or a right to use such ducts or conduits;

G. If applicant is proposing an underground installation within new ducts or conduits to be constructed within the public ways:

1. The location proposed for the new ducts or conduits; and

2. The excess capacity that will exist in such ducts or conduits after installation of applicant's utility or telecommunications facilities;

H. A preliminary construction schedule and completion date;

I. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities, and to offer or provide the utility or telecommunications services, including, but not limited to, evidence that the applicant has registered with the Washington Utilities and Transportation Commission;

J. All deposits or charges required pursuant to this title;

K. Proof of ability to meet city's bonding requirements in ACC 12.24.050 when the applicant does not have an existing standing bond on file with the city sufficient to cover the scope of work proposed and proof of ability to meet security requirements in ACC 20.10.240 through 20.10.260;

L. A copy of an Auburn business registration stamped and signed by the city clerk; and

M. A nonrefundable application fee in the amount of $500.00. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.030 Notice of complete application and scheduling of public hearing.

A. Within 30 calendar days after receipt of the public way agreement application, the city will complete review of the application to determine whether the application contains sufficient information as outlined in ACC 20.04.020 to proceed with processing. If during the 30-calendar-day review period, the city engineer determines that the application is incomplete, the city engineer will issue a letter to the applicant specifying the additional information necessary to complete the application. The applicant will be

given 30 calendar days to respond to the request for additional information. Once the additional information is received by the city, an additional 14 calendar days will be allowed to determine whether the application is complete. Once the application is determined complete, written notice will be provided following the procedure outlined in this subsection. If the applicant needs additional time to respond, the applicant may request up to an additional 30 calendar days. If a response is not timely received, the application will be returned to the applicant with a notice that the application is rejected due to failure to provide the required information. Any new applications will require a new application fee.

B. When satisfied that the application is complete, the city engineer will notify the applicant in writing that the application is complete and inform the applicant of the schedule for consideration by the public works committee. If the public works committee determines that the application merits a separate public hearing, it shall recommend to the city council that it schedule a public hearing. The city clerk will notify the applicant in writing of the scheduled hearing. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.040 Determination by the city.

Within 180 calendar days from the time of notification that the application is complete, under ACC 20.04.030(A), the city council shall reach a decision. The city council's decision to grant or deny, in whole or in part, an application for a public way agreement shall be based upon the following:

A. Whether the applicant has received all requisite licenses, certificates, and authorizations from the Federal Communications Commission, the Washington Utilities

and Transportation Commission, and any other federal or state agency with jurisdiction over the activities proposed by the applicant;

B. The capacity of the public ways to accommodate the applicant's proposed facilities;

C. The capacity of the public ways to accommodate additional utility, cable, and telecommunications facilities if the public way agreement is granted;

D. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the public way agreement is granted;

E. The public interest in minimizing the cost and disruption of construction within the public ways;

F. The service that applicant will provide to the community and/or the region;

G. The effect, if any, on public health, safety and welfare if the public way agreement is granted;

H. The availability of alternate routes and/or locations for the proposed facilities;

I. Applicable federal and state utility and telecommunications laws, regulations and policies;

J. The ability to avoid or mitigate, to the city's satisfaction, future conflicts with the operation, repair, replacement, and maintenance of city-owned and other public/private utilities;

K. The ability of the applicant to stabilize existing pavement structures prior to disturbance in a manner sufficient to ensure future deterioration is not accelerated by virtue of the installed facilities, and/or the ability and willingness of the applicant to fully mitigate such damages to the extent that they may prove unavoidable to the satisfaction of the city. Such security for the pavement's integrity may include additional periods of warranty bonding for up to five years from the date of completion of work as determined by the city engineer;

L. Demonstrated ability and commitment to meet city bonding and security requirements established in ACC 20.10.240 through 20.10.260 and Chapter 12.24 ACC; and

M. Such other factors as may demonstrate that the public way agreement to use the public ways will serve the community interest. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.050 Notification of council action and execution of agreement.

Upon the city council's decision, the public works director shall notify the applicant of the decision including reason(s) for denial and instruct the applicant of the procedure to follow to complete execution of the agreement if approved by the city council. No public way agreement shall be deemed to have been granted hereunder until the applicant and the city have fully executed a written agreement approved by the city council setting forth the particular terms and provisions under which the grantee has been granted the right to occupy and use public ways of the city and the applicant has provided the security deposits and proof of insurance as required by Chapter 20.10 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.060 Nonexclusive public way agreements.
No public way agreement granted under this title shall confer any exclusive right, privilege, license or franchise to occupy or use the public ways of the city for delivery of telecommunications services or any other purposes. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.070 Rights granted.
No public way agreement granted under this title shall convey any right, title or interest in the public ways, but shall be deemed an authorization only to use and occupy the public ways for the limited purposes and term stated in the public way agreement. Further, no public way agreement shall be construed as any warranty of title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.080 Term of telecommunications public way agreements.
By virtue of the uncertainties created by the Act, unless otherwise specified in an existing public way agreement, no agreement granted hereunder shall be in effect for a term exceeding five years. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.090 Specified route.
A public way agreement granted under this title shall be limited to a use of public ways specified and defined in the agreement. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.100 Service to city users.
A grantee shall be permitted to use public ways to offer or provide utility or telecommunications services to persons or areas within the city only upon city council approval of a telecommunications franchise agreement pursuant to this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.110 Amendment to public way agreements.
A new application shall be required of any commercial utility or telecommunications provider who desires to extend or locate its facilities in public ways of the city which are not included in a public way agreement previously granted under this title. If a grantee is required by the city to locate or relocate its facilities in public ways not included in a previously granted public way agreement, the city shall grant an amendment to the agreement without further application. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.120 Renewal of public way agreements.
A provider that desires to renew its public way agreement in effect under this chapter for an additional term not to exceed five years shall, not more than 180 days nor less than 120 days before expiration of the public way agreement in effect, file an application, which is determined as complete in accordance with ACC 20.04.030, with the city for renewal which shall include the following:

A. The information required pursuant to ACC 20.04.020;

B. Any information required pursuant to the public way agreement between the city and the grantee;

C. All deposits or charges required pursuant to this chapter; and

D. A nonrefundable application fee of $75.00. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.130 Determination by city for renewal of public way agreements.
The process specified in ACC 20.04.030 for determining and notifying the applicant of completeness of application shall

be used for renewals. Within 120 days after receiving a complete application for renewal, following the procedures in ACC 20.04.040, the city council shall grant or deny the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reason(s) for denial. The decision to grant or deny an application for the renewal of a public way agreement shall, in addition to the criteria set forth in ACC 20.04.040, be based upon the following:

A. The continuing capacity of the public ways to accommodate the applicant's existing facilities; and

B. The applicant's compliance with the requirements of this title and the public way agreement. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.140 Notification of council action on renewal of public way agreements and execution of agreements.
Once the city council has decided on the renewal application, the procedures outlined in ACC 20.04.050 shall be followed for execution of any agreement renewals. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.150 Obligation to cure as a condition of renewal.
No public way agreement shall be renewed until any ongoing violations or defaults in the grantee's performance under the public way agreement, or of the requirements of this title, have been cured, or a plan, secured by a sufficient bond or deposit of funds to the city's satisfaction, detailing the corrective action to be taken by the grantee has been approved in writing by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.160 Reserved.
(Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.170 Annual fee for recovery of city costs.
Each public way agreement granted under this title is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid as reimbursement for the city's costs in connection with reviewing, inspecting and supervising the use and occupancy of the public ways on behalf of the public and existing or future users; provided further, that the compensation required from any utility or telecommunications provider or carrier engaged in the "telephone business," as defined in RCW 82.04.065 shall be consistent with RCW 35.21.860. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.04.180 Other city costs.
All grantees shall, within 30 days after written demand, reimburse the city for all direct and indirect costs and expenses incurred by the city in connection with any modification, amendment, renewal or transfer of the public way agreement. In addition, all grantees shall, within 30 days after written demand, reimburse the city for any and all costs the city reasonably incurs in response to any emergency involving the grantee's facilities. All grantees shall, within 30 days after written demand, reimburse the city for the grantee's proportionate share of all actual, identified expenses incurred by the city in planning, constructing, installing, repairing or altering any city facility as a result of the construction or the presence in the public ways of the grantee's facilities. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

CHAPTER 20.06
FRANCHISE
Sections:
20.06.010 Franchise requirements.

20.06.020 Franchise applications.
20.06.030 Notice of complete application and scheduling of public hearing.
20.06.040 Determination by the city.
20.06.050 Notification of council action and execution of franchise.
20.06.060 Nonexclusive franchise.
20.06.070 Term of franchise.
20.06.080 Rights granted.
20.06.090 Franchise territory.
20.06.100 Franchise fees in addition to utility taxes.
20.06.110 Nondiscrimination.
20.06.120 Amendment of franchise.
20.06.130 Renewal of franchise.
20.06.140 Determination by city for renewal of franchise.
20.06.150 Obligation to cure as a condition of renewal.
20.06.160 Reserved.
20.06.170 Other city costs.
20.06.180 Compensation for use of public ways.
20.06.190 Accounts, books and records.

20.06.010 Franchise requirements.

A franchise shall be required of any commercial utility or telecommunications operator or carrier or other person who desires to occupy public ways of the city and to provide telecommunications or commercial utility services to any person or area in the city; provided, however, that a public way agreement may be approved in accordance with the provisions of this title instead of a franchise in the following circumstances:

A. A privately owned telecommunications network or telecommunications system which is operated solely for purposes of serving itself. An example of such a network or telecommunications system includes, but is not limited to, a

telecommunications network connecting two business facilities under common ownership or control, when said facilities are not offered to other business entities or persons.

B. De minimus uses of public ways made in conjunction with a wireless telecommunications facility located entirely upon publicly or privately owned property. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.020 Franchise applications.

Any person who desires a telecommunications or a commercial utility franchise pursuant to this title shall file an application with the city public works department which, in addition to the information required by ACC 20.04.020, shall include the following:

A. Whether the applicant intends to provide cable service, video dialtone service or other video programming service, and sufficient information to determine whether such service is subject to cable franchising;

B. An accurate map showing the location of any existing utility or telecommunications facilities in the city that applicant intends to use or lease so that the city can keep track of various systems using the public way(s) to prevent interference between the users;

C. A description of the services or facilities that the applicant will offer or make available to the city and other public, educational and governmental institutions, if any;

D. A description of applicant's service, access and line extension policies;

E. The area or areas of the city the applicant desires to serve and an initial schedule for build-out to the entire franchise area;

F. The applicant's intended means and methods of providing service and whether shared use of other utility poles or conduits is envisioned;

G. All fees, deposits or charges required pursuant to this chapter;

H. Such other and further information as permitted by federal and state law as may be requested by the city;

I. Proof of ability to meet city's bonding requirements in ACC 12.24.050 when the applicant does not have an existing standing bond on file with the city sufficient to cover the scope of work proposed and proof of ability to meet security requirements in ACC 20.10.240 through 20.10.260;

J. A copy of an Auburn business registration stamped and signed by the city clerk; and

K. A nonrefundable application fee in the amount of $2,500. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.030 Notice of complete application and scheduling of public hearing.

A. Notice of Complete Application. Within 30 calendar days after receipt of the franchise application, the city will complete review of the application to determine whether the application contains sufficient information as outlined in ACC 20.06.020 to proceed with processing. If during the 30-calendar-day review period, the city engineer determines that the application is incomplete, the city engineer will issue a letter to the applicant specifying the

additional information necessary to complete the application. The applicant will be given 30 calendar days to respond. Once the additional information is received by the city, an additional 14 calendar days will be allowed to determine whether the application is complete. Once the application is determined complete, written notice will be provided. If the applicant needs additional time to respond the applicant may request up to an additional 30 calendar days. If a response is not timely received, the application will be returned to the applicant with a notice that the application is rejected due to failure to provide the required information. Any new applications will require a new application fee.

B. Scheduling of Public Hearing. When satisfied that the application is complete, the city engineer will notify the applicant in writing that the application is complete and inform the applicant of the schedule for consideration by the public works committee. The public works committee shall review the proposal to include the planned use of the public ways and recommend any modifications required prior to recommending setting the public hearing by the city council. Once satisfied as to the terms of the negotiated draft franchise agreement, the public works committee shall recommend that the city council set the date for the public hearing. The city council will schedule the hearing and the city clerk will notify the applicant in writing of the scheduled hearing. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.040 Determination by the city.

Within 180 calendar days from the time of notification that the application is complete, under ACC 20.06.030(A), the city shall issue a written determination granting or denying the application in whole or in part. Prior to granting or denying a franchise under this title, the city council shall

conduct a public hearing and make a decision based upon the criteria set forth below. Pursuant to Section 253(c) of the Federal Act, public disclosure of any fees as compensation for use of public right-of-way is required, and RCW 35A.47.040 provides that the city council shall not approve any franchise hereunder until the next regularly scheduled council meeting following the public hearing. If the application is denied, in whole or in part, the written determination shall include the reason(s) for denial. The decision to grant or deny, in whole or in part, an application for a telecommunications franchise shall be based upon the following:

A. Whether the applicant has received all requisite licenses, certificates, and authorizations from the Federal Communications Commission, the Washington Utilities and Transportation Commission, and any other federal or state agency with jurisdiction over the activities proposed by the applicant;

B. The capacity of the public ways to accommodate the applicant's proposed facilities;

C. The capacity of the public ways to accommodate additional utility and telecommunications facilities if the franchise is granted;

D. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the franchise is granted;

E. The public interest in minimizing the cost and disruption of construction within the public ways;

F. The service that applicant will provide to the community and region;

G. The effect, if any, on public health, safety and welfare if the franchise requested is granted;

H. The availability of alternate routes and/or locations for the proposed facilities;

I. Applicable federal and state utility and telecommunications laws, regulations and policies;

J. The ability to avoid, or mitigate to the city's satisfaction, future conflicts with the operation, repair, replacement, and maintenance of city-owned and other commercial utilities;

K. The ability of the applicant to stabilize existing pavement structures prior to disturbance in a manner sufficient to ensure future deterioration is not accelerated by virtue of the installed facilities, and/or the ability and willingness of the applicant to fully mitigate such damages to the extent that they may prove unavoidable to the satisfaction of the city. Such security for the pavement's integrity may include additional periods of warranty bonding for up to five years from date of completion of work as determined by the city engineer;

L. Demonstrated ability and commitment to meet city bonding and security requirements established in ACC 20.10.240 through 20.10.260 and Chapter 12.24 ACC; and

M. Such other factors as may demonstrate that the franchise to use the public ways will serve the community interest. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.050 Notification of council action and execution of franchise.

Upon the city council's decision the public works director shall notify the applicant of the decision, including

reason(s) for any denial, and instruct the applicant of the procedure to follow to complete execution of the agreement if approved by the city council. No franchise shall be deemed to have been granted hereunder until after the public hearing and city council approval of a written agreement setting forth the particular terms and provisions under which the franchisee has been granted the right to occupy and use public ways of the city and both the city and applicant have fully executed the franchise and the applicant has provided the security deposits and proof of insurance as required by Chapter 20.10 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.060 Nonexclusive franchise.

No franchise granted under this title shall confer any exclusive right, privilege, license or franchise to occupy or use the public ways of the city for delivery of utility or telecommunications services or any other purposes. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.070 Term of franchise.

By virtue of the uncertainties created by the Act, unless otherwise specified in an existing franchise agreement, a telecommunications franchise granted by the city pursuant to this title shall be valid for a term not to exceed five years. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.080 Rights granted.

No franchise granted under this chapter shall convey any right, title or interest in the public ways, but shall be deemed a franchise only to use and occupy the public ways for the limited purposes and term stated in the franchise. Further, no franchise shall be construed as any warranty of title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.090 Franchise territory.
Unless otherwise provided in the franchise ordinance, a franchise granted under this chapter shall authorize the franchisee to operate in the public ways throughout the city when a permit to install the necessary facilities has been approved by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.100 Franchise fees in addition to utility taxes.
Revenue derived directly or indirectly from sources within the city shall be subject to applicable utility taxes as of the time of commencement of such operations. Franchise fees shall be in addition to any utility tax, but shall be collectible only to the extent as then allowed by law, and in no event may the combined utility tax and franchise fee exceed six percent of gross revenue. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.110 Nondiscrimination.
A franchisee which purports to serve the general public shall make its utility or telecommunications services available to any customer within its franchise area who shall request such service, without discrimination as to the terms, conditions, rates or charges for the franchisee's services; provided, however, that nothing in this title shall prohibit a franchisee from making any reasonable classifications among differently situated customers. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.120 Amendment of franchise.
Except as otherwise provided within an existing franchise ordinance, a new franchise application shall be required of any commercial utility or telecommunications carrier or operator that desires to extend its franchise territory or to locate its utility or telecommunications facilities in public ways of the city which are not included in a franchise

previously granted under this title. If a franchisee is required by the city to locate or relocate its facilities in public ways not included in a previously granted franchise, the city shall grant a franchise amendment without further application. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.130 Renewal of franchise.

A franchisee that desires to renew its franchise under this chapter for an additional five-year term shall, not more than 240 days nor less than 180 days before expiration of the franchise in effect, file an application, which is determined as complete in accordance with ACC 20.06.030, with the city for a renewal of its franchise which shall include the following:

A. The information required pursuant to ACC 20.06.020;

B. Any information required pursuant to the franchise agreement between the city and the franchisee;

C. All deposits or charges required pursuant to this chapter;

D. A nonrefundable application fee in the amount of $500.00. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.140 Determination by city for renewal of franchise.

The process specified in ACC 20.06.030 for determining and notifying of completeness of application shall be used for renewals. Within 120 calendar days after receiving a complete application for renewal, following the procedures in ACC 20.06.030, the city council shall grant or deny the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reason(s) for denial. Prior to granting or denying renewal of a franchise under this chapter, in whole

or in part, the city council shall conduct a public hearing and make a decision based upon the criteria set forth below in addition to all criteria in ACC 20.06.040.

A. The continuing capacity of the public ways to accommodate the applicant's existing facilities.

B. The applicant's compliance with the requirements of this title and the franchise agreement.

C. Applicable federal, state and local utility and telecommunications laws, rules and policies.

D. Such other factors as may demonstrate that the continued franchise to use the public ways will serve the community interest. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.150 Obligation to cure as a condition of renewal.
No franchise shall be renewed until any ongoing violations or defaults in the franchisee's performance of the franchise agreement, or of the requirements of this title, have been cured, or a plan detailing the corrective action to be taken by the franchisee has been approved in writing by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.160 Reserved.
(Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.170 Other city costs.
All franchisees shall, within 30 days after written demand, reimburse the city for all direct and indirect costs and expenses incurred by the city in connection with any modification, amendment, renewal or transfer of the franchise or any franchise agreement. In addition, all franchisees shall, within 30 days after written demand,

reimburse the city for any and all costs the city reasonably incurs in response to any emergency involving the franchisee's utility or telecommunications facilities. Finally, all franchisees shall, within 30 days after written demand, reimburse the city for the franchisee's proportionate share of all actual, identified expenses incurred by the city in planning, constructing, installing, repairing or altering any city facility as a result of the presence in the public way of the franchisee's utility or telecommunications facilities. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.180 Compensation for use of public ways.

A. The city finds that the public ways to be used by commercial utilities and carriers and operators in the operation of telecommunications systems within the boundaries of the franchise are valuable public properties, acquired and maintained by the city at great expense to its taxpayers, and that the grant of use of said public ways is a valuable property right, without which grantees and franchisees would be required to invest substantial capital in public way costs and acquisitions; therefore, grantees and franchisees shall pay the city as a general compensation for the use of the public way during each year of the term of a franchise a franchise fee as determined by city council, not to exceed six percent of gross revenues for each quarter of each calendar year. Franchisees shall pay the franchise fee mandated by this chapter but the city acknowledges and understands that such amount (and any other fees, assessments, or taxes imposed on franchisees not described in ACC 20.06.180(E)) shall appear as a line item on the bill sent to, and shall be collected from, the subscribers; provided further, that the compensation required from any telecommunications operator or carrier engaged in the "telephone business," as defined in RCW 82.04.065 shall be consistent with RCW 35.21.860.

B. Annual Franchise Fee Adjustments. The initial annual franchise fee percentage shall be four and one-half percent of gross revenues unless and until it is further adjusted by city council. Any such adjustment shall occur at least 60 days before any subsequent annual anniversary date. Any adjustment shall become effective on the subsequent annual anniversary date.

C. Quarterly Payment. Franchisees shall forward by check wire transfer an amount equal to this quarterly payment by the fifteenth day of the second calendar month immediately following the close of the calendar quarter for which the payment is calculated.

D. Late Payment. In the event any quarterly payment is made after noon on the date 10 days after the date due, franchisees shall pay a late payment penalty of the greater of:

1. Twenty-five dollars; or

2. Simple interest at a 12 percent annual percentage rate on the total amount past due.

E. Fees and Compensation Not a Tax. The fees, charges and fines provided for in this title and any compensation charged and paid for the franchisee's use of the city's public ways, whether "fiduciary or in kind", are separate from, and additional to, any and all federal, state, local and city taxes as may be levied, imposed or due from a commercial utility, telecommunications carrier, operator, or provider, its customers or subscribers or on account of the lease, sale, delivery or transmission of utility or telecommunications services.

F. Ruling of Unenforceability. The compensation required from any commercial utility, telecommunications carrier,

operator, or provider shall be as provided by law. In the event any franchise fee shall be held unenforceable by a court of law which has jurisdiction over the city, franchisees shall pay the equivalent amount paid in franchise fees as a city utility tax which, shall be applied retroactively to time periods during which the franchise fee was determined to be unenforceable.

G. Quarterly Report. In order to properly determine the gross revenues received by franchisees, the franchisee shall on the same date that each quarterly payment is made, file with the director of finance a sworn copy of a report, in a form acceptable to the city, in sufficient detail to itemize revenues from each of the revenue categories. The city may, if it sees fit and at its own expense, have the books and records of franchisees examined by a representative of said city to ascertain the correctness of the reports agreed to be filed herein. Neither the acceptance of any payment nor any subsequent review shall be deemed an agreement by the city that the correct payment was paid, absent a fully authorized written release by the city on any such payments or on such reports. Any necessary prorations shall be made in the first and last year of each term of the franchise. Any city request for access to books and records shall be allowed by the franchisee at reasonable times and for reasonable purposes. Such information shall be held in strict confidence by the city as allowed by law and used only for the purpose stated herein.

H. Recalculation at End of Compensation Year. At the end of each calendar year, franchisees shall recalculate the total general compensation actually due. If additional amounts are due the city by franchisee, said amounts shall be paid by the fifteenth day of February following the calendar year during which such amounts were originally due. If amounts are found to be due the franchisees by the city,

said amounts shall be credited by the fifteenth day of February during which such amounts were originally due. Any necessary prorations will be made.

I. Taxes are Not to Be a Credit. The compensation paid under this franchise shall be exclusive of and in addition to all special assessments and taxes of whatever nature which are applicable to all other persons or entities doing business within the city, including, but not limited to, ad valorem tax, sales tax, corporate or business occupation taxes or other taxes or fees imposed or levied by any governmental entity.

J. Utility Tax Liability – Franchise Fees. Revenues derived directly or indirectly from sources within the city shall be subject to applicable utility taxes as of the time of commencement of such operations. Franchise fees shall be in addition to any utility tax, but shall be collectible only to the extent as then allowed by law, and in no event may the combined utility tax and franchise fee exceed six percent of gross revenues in accordance with RCW 35.21.870. Franchise fees, if applicable, shall be levied on a nondiscriminatory basis.

K. Rights of City. Payment of money under any franchise shall not in any way limit or inhibit any of the privileges or rights of the city, except insofar as city's privileges or rights are expressly limited or inhibited by the terms of a franchise.

L. Annual Report. Franchisees shall file annually with the director of finance no later than 90 days after the end of franchisee's fiscal year, an unaudited statement of revenues (for that fiscal year just ended) attributable to the operations of the franchisee's telecommunications system, within the city pursuant to the franchise agreement. The

statement shall present a detailed breakdown of gross revenues and uncollectible accounts for the year. The city may, if it sees fit, have such report audited by an independent certified public accountant of its choosing. If the audit reveals an underpayment error in payment by franchisees of more than five percent, then franchisees shall pay for the costs of the audit. If the audit reveals an error in payment of five percent or less, the city shall pay the costs of the audit. The report will summarize those accounts reconciled to be within the franchise area by the city's quarterly review.

M. Circumventing Payments. Any transaction(s) which have the effect of circumventing payment of the required franchise fees and/or evasion of payment of franchise fees or any payments due the city under a franchise by noncollection or nonreporting of gross revenues, bartering, or any other means which evade the actual collection of revenues for business pursued by franchisees are prohibited.

N. Best Rates. As allowed by applicable law, part of the compensation to the city for the grant of any telecommunications franchise, the city shall be entitled to obtain subscriptions, at the city's discretion, to the communications service at franchisee's lowest comparable rate applicable to any government body or municipality of the state of Washington. In addition, city shall be entitled to franchisee's lowest comparable rate applicable to any governmental body or municipality of the state of Washington for purchase and/or lease, should the city determine to purchase and/or lease, equipment or modems applicable to government bodies or municipalities in the state of Washington for purposes of accessing the communications service. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.06.190 Accounts, books and records.

The franchisee shall keep the city fully informed as to accounting methods and procedures in connection with the recording and reporting by the franchisee of all revenues and uncollectibles.

A. City to Be Informed. Franchisees shall keep the city fully informed as to all matters in connection with or which may affect the construction, reconstruction, removal, maintenance, operation and repair of franchisee's system located in public way(s), franchisee's accounting methods and procedures in connection therewith, and the recording and reporting by franchisees of all revenues and uncollectibles. Franchisees shall comply with the city's determination regarding forms for reports, the time for reports, the frequency with which any reports are to be made, and whether reports are to be made under oath. The city acknowledges that a franchisee may be a reporting company under the Securities Exchange Act of 1934 and that shares of its stock are publicly traded. As such, a franchisee may be precluded from disclosing certain sensitive, nonpublic information by virtue of rules and regulations promulgated under such act or otherwise.

B. Accounts. The franchisee shall keep complete and accurate books of account and records of its business and operations subject to this franchise chapter in accordance with generally accepted accounting principles or in accordance with accounting rules prescribed by applicable federal or state regulatory agencies. The city may require the keeping of additional records or accounts which are reasonably necessary for purposes of identifying, accounting for, and reporting gross revenues and uncollectibles. All subscribers who report a service address in the city of Auburn shall be subject to taxes and fees

under this franchise. When required by the city, the franchisee shall make available a complete list of all service addresses within the city of Auburn. This list shall be available for review by the city at a local franchisee's business office. The list will be provided on a computer disc in ASCII format sorted by zip code. It is understood this data is only needed for Auburn to perform an audit to ascertain that the correct subscribers are subjected to Auburn taxes and fees. As the city annexes new areas, those zip codes, if any, will be added.

C. Access to Records. The franchisee shall provide the city with access at reasonable times and for reasonable purposes, to examine, audit, review and/or obtain copies of the papers, books, accounts, documents, maps, plans and other records of the franchisee pertaining to this franchise chapter. The franchisee shall fully cooperate in making available its records and otherwise assisting in these activities. Such information shall be held in strict confidence by the city, as allowed by law, and used only for the purpose stated herein.

D. Inquiries to Franchisee. The city may, at any time, make inquiries pertaining to the franchisee's operation of its utility or telecommunications system within the franchise area. The franchisee shall respond to such inquiries on a timely basis. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

CHAPTER 20.08
FACILITIES LEASE

Sections:

20.08.010 Facilities lease.
20.08.020 Lease application.
20.08.030 Notice of complete application and scheduling of public hearing.
20.08.040 Determination by the city.

20.08.050 Notification of council action and execution of lease.
20.08.060 Nonexclusive lease.
20.08.070 Term of facilities lease.
20.08.080 Rights granted.
20.08.090 Interference with other users.
20.08.100 Ownership and removal of improvements.
20.08.110 Cancellation of lease by lessee.
20.08.120 Compensation to the city.
20.08.130 Amendment of facilities lease.
20.08.140 Renewal of facilities lease.
20.08.150 Determination by the city for renewal of facility lease.
20.08.160 Obligation to cure as a condition of renewal.

20.08.010 Facilities lease.

The city council may, in its sole discretion, which is hereby reserved, approve facilities leases for the location of commercial utility or telecommunications facilities and other nontelecommunications facilities upon city property, as that term is defined in this title. Neither this chapter, nor any other provision of this title shall be construed to create an entitlement or vested right in any person or entity of any type to the use of any city property or city facility. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.020 Lease application.

Any person that desires to solicit the city's approval of a facilities lease pursuant to this title shall file a lease proposal with the city which, in addition to the information required by ACC 20.06.020, shall include the following:

A. A description of the facilities or other equipment proposed to be located upon city property;

B. A description of the city property upon which the applicant proposes to locate facilities or other equipment;

C. Preliminary plans and specifications in sufficient detail to identify:

1. The location(s) of existing telecommunications facilities or other equipment upon the city property, whether publicly or privately owned.

2. The location and source of electric and other utilities required for the installation and/or operation of the proposed facilities or equipment;

D. Accurate scale conceptual drawings and diagrams of sufficient specificity to analyze the aesthetic impacts of the proposed telecommunications facilities or other equipment;

E. If applicant is proposing to install aboveground and/or overhead facilities:

1. Evidence that surplus space is available for locating its telecommunications facilities on existing utility poles along the proposed route;

2. Proof of compliance with city's zoning code;

F. Whether the applicant intends to provide cable service, video dialtone service or other video programming service, and sufficient information to determine whether such service is subject to cable franchising;

G. An accurate map showing the location of any existing utility or telecommunications facilities in the city that applicant intends to use or lease;

H. A description of the services or facilities that the applicant will offer or make available to the city and other public, educational, and governmental institutions;

I. A copy of an Auburn business registration stamped and signed by the city clerk;

J. Proof of ability to meet city's bonding requirements in Chapter 12.24 ACC when the applicant does not have an existing standing bond on file with the city sufficient to cover the scope of work proposed and proof of ability to meet the city's security requirements in ACC 20.10.240 through 20.10.260;

K. A nonrefundable application fee in the amount of $500.00; and

L. Such other and further information as may be requested by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.030 Notice of complete application and scheduling of public hearing.

A. Within 30 calendar days the city will complete an initial review of the application to determine whether the application contains sufficient information as outlined in ACC 20.08.020 to proceed with processing. Once satisfied that the proposal is clear, the mayor will appoint a negotiation team to meet with the applicant and determine whether additional information is needed. The team shall as a minimum consist of the finance director, a legal representative, and the department director affiliated with the property being considered for lease. If during the 30-calendar-day review period, the application is deemed incomplete, the city will issue a letter to the applicant specifying the additional information necessary in order to proceed with processing. The applicant will be given 30

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Page(s) 102-103 missing in original document

J. The potential for radio frequency and other interference or impacts upon residential, commercial, and other uses located within the vicinity of the city property.

K. Whether the city's property zoning supports the proposed land use.

L. Demonstrated ability and commitment to meet city bonding and security requirements established in ACC 20.10.240 through 20.10.260.

M. Such other factors as may demonstrate that the lease to use the city property will serve the community interest.

N. Other criteria determined to be necessary or appropriate to the public health, safety, or welfare of the community. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.050 Notification of council action and execution of lease.

Upon the city council's decision, the finance director shall notify the applicant of the decision and instruct the applicant of the procedure to follow to complete execution of the lease agreement if approved by the city council. No facilities lease shall be deemed to have been granted hereunder until after any scheduled public hearing and city council approval of a written agreement setting forth the particular terms and provisions under which the lessee has been granted the right to occupy and use the city property specified in the lease and both the city and applicant have fully executed the lease and the applicant has provided the security deposits and proof of insurance as required by Chapter 20.10 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.060 Nonexclusive lease.
No facilities lease granted under this title shall confer any exclusive right, privilege, license, or franchise to occupy or use city property for delivery of utility or telecommunications services or any other purposes. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.070 Term of facilities lease.
By virtue of the uncertainties created by the Act, except as provided in an existing lease agreement, a facilities lease granted hereunder shall be valid for a maximum term of five years, subject to renewal as provided in this chapter. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.080 Rights granted.
No facilities lease granted under this chapter shall convey any right, title or interest, of any kind, in the city property, but shall be deemed a license only to use and occupy the city property for the limited purposes and term stated in the lease agreement. Further, no facilities lease shall be construed as any warranty of title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.090 Interference with other users.
No facilities lease shall be granted under this title unless it contains a provision which is substantially similar to the following:

> The City has previously entered into leases with other tenants for their equipment and telecommunications facilities. Lessee acknowledges that the City is also leasing the City property for the purposes of transmitting and receiving telecommunications signals from the City property. The City, however, is not in any way responsible or liable for any interference with

Lessee's use of the City property which may be caused by the use and operation of any other tenant's equipment, even if caused by new technology. In the event that any other tenant's activities interfere with the Lessee's use of the City property, and the Lessee cannot work out this interference with the other tenants, the Lessee may, upon 30 days' notice to the City, terminate this Lease and restore the City property to its original condition, reasonable wear and tear excepted. The Lessee shall cooperate with all other tenants to identify the causes of, and work towards the resolution of, any electronic interference problem. In addition, the Lessee agrees to eliminate any radio or television interference caused to City-owned or other public/private facilities or surrounding property owners, residents, or tenants at Lessee's own expense and without installation of extra filters on City-owned equipment. Lessee further agrees to accept such interference as may be received from City operated telecommunications or other facilities located upon the City property subject to this Lease.

(Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.100 Ownership and removal of improvements. No facilities lease shall be granted under this title unless it contains a provision which states that all buildings, landscaping, and all other improvements, except lessee's equipment, shall become the property of the city upon expiration or termination of the lease. In the event that the city requires removal of such improvements, such removal shall be accomplished at the sole expense of the lessee and completed with full restoration of the site to the original condition or its practical equivalent as determined by the city, within 90 days after receiving written notice from the

city requiring removal of the improvements. Further, in the event that utility or telecommunications facilities or other equipment are left upon city property after expiration or termination of the lease, they shall become the property of the city if not removed by the lessee after 30 days' written notice from the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.110 Cancellation of lease by lessee.

A. All facilities leases are contingent upon the prospective lessee obtaining all necessary permits, approvals, and licenses for the proposed facilities. In the event that the prospective lessee is unable to obtain all such permits, approvals, and licenses, it may cancel its lease, and obtain a pro rata refund in any rents paid, without further obligation by giving 30 days' prior written notice to the city.

B. In the event that the holder of a facilities lease determines that the city property is unsuitable for its intended purpose, the lessee shall have the right to cancel the lease upon 120 days' written notice to the city. However, no prepaid rent shall be refundable. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.120 Compensation to the city.

Each facilities lease granted under this title is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for the rights granted to a lessee; provided, nothing in this title shall prohibit the city and a lessee from agreeing to the compensation to be paid. Such compensation shall be payable in advance of the effective date of the lease and on or before January 31st of each calendar year. Any payments received after the due date shall include a late payment penalty of two percent of the annual rental fee for each day

or part thereof past the due date. If any or all of the rental fee is more than 60 calendar days delinquent, the lease will automatically terminate on the sixty-first calendar day of delinquency, and the city may proceed to collect against any security provided by the lessee. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.130 Amendment of facilities lease.

Except as provided within an existing lease agreement, a new lease application and lease agreement shall be required of any lessee that desires to expand, modify, or relocate its facilities or other equipment located upon city property. If the lessee is required by the city to locate or relocate its facilities or other equipment on the city property, the city shall grant a lease amendment without further application. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.140 Renewal of facilities lease.

A lessee that desires to renew its facilities lease in effect under this chapter shall, not more than 120 days nor less than 90 days before expiration of the facilities lease then in effect, file an application, which is determined as complete in accordance with ACC 20.08.030, with the city for renewal of its facilities lease which shall include the following:

A. The information required pursuant to ACC 20.08.020;

B. Any information required pursuant to the facilities lease agreement between the city and the lessee;

C. All deposits or charges required pursuant to this chapter;

D. A nonrefundable application renewal fee in the amount of $250.00. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.150 Determination by the city for renewal of facility lease.

All renewals of leases subject to this title shall be renewed in accordance with the provisions of ACC 20.08.030 and 20.08.040. Recognizing that the city council is under no obligation to approve a renewal of a facilities lease for the use of city property, the city council shall attempt to consider and take action on applications for renewal of such leases within 90 days after receiving a complete application for such a lease renewal. When such action is taken, the city shall issue a written determination granting or denying the lease renewal, in whole or in part. If the renewal application is denied, the written determination shall include the reason(s) for denial. The decision to grant or deny an application for renewal of a facilities lease shall be based upon, but not limited to, the following:

A. The continuing capacity of the city property to accommodate the applicant's existing facilities.

B. The applicant's compliance with the requirements of this title and the lease agreement.

C. Such other factors as may demonstrate that the continued approval to use the city property ways will serve the community interest.

D. Any criteria contained in ACC 20.08.040. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.08.160 Obligation to cure as a condition of renewal.

No facilities lease shall be renewed until any ongoing violations or defaults in the lessee's performance of the lease agreement, or of the requirements of this title, have been cured, or a plan, secured by bond or deposit account to the city's satisfaction, detailing the corrective action to be

taken by the lessee has been approved in writing by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

CHAPTER 20.10
CONDITIONS OF PUBLIC WAY AGREEMENTS, FRANCHISES, AND FACILITIES LEASES

Sections:

20.10.010 Purpose.
20.10.020 Acceptance and effective date.
20.10.030 Police power.
20.10.040 Rules and regulations by the city.
20.10.050 Location of facilities.
20.10.060 Compliance with One Number Locator Service.
20.10.070 Construction permits.
20.10.080 Interference with the public ways.
20.10.090 Damage to property.
20.10.100 Notice of work.
20.10.110 Repair and emergency work.
20.10.120 Maintenance of facilities.
20.10.130 Abandonment, relocation or removal of facilities.
20.10.140 Building moving.
20.10.150 Removal of unauthorized facilities.
20.10.160 Emergency removal or relocation of facilities.
20.10.170 Damage to facilities.
20.10.180 Restoration of public ways, other ways, city property and public/private utility property.
20.10.190 Facilities maps.
20.10.200 Duty to provide information.
20.10.210 Leased capacity.
20.10.220 Insurance.
20.10.230 General indemnification.
20.10.240 Performance and construction surety.
20.10.250 Security options.
20.10.260 Performance bond.

20.10.270 Coordination of construction activities.
20.10.280 Assignments or transfers of public way agreements, franchises, or leases.
20.10.290 Transactions affecting control of public way agreements, franchises, or leases.
20.10.300 Revocation or termination of public way agreements, franchises, or leases.
20.10.310 Notice and duty to cure.
20.10.320 Public hearing.
20.10.330 Standards for revocation or lesser sanctions.
20.10.340 Civil penalties.
20.10.350 Enforcement.
20.10.360 Other remedies.
20.10.370 Venue of any court action.
20.10.380 Action by the FCC.
20.10.390 Incorporation by reference.
20.10.400 Notice of entry on private property.
20.10.410 Safety requirements.
20.10.420 Most favored community.
20.10.430 Compliance with zoning standards.
20.10.440 Unfunded mandate.
20.10.450 Care of trees along streets.
20.10.460 Use of utility poles and facilities of others.
20.10.470 Use of poles and facilities by city.
20.10.480 Administration.

20.10.010 Purpose.

The purpose of this chapter is to set forth certain terms and conditions which are common to all public way agreements, franchises, and facilities leases granted under the provisions of this title. Except as otherwise provided in this chapter or in such a public way agreement, franchise, or lease, the provisions of this chapter apply to all such public way agreements, franchises, and leases approved or granted by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.020 Acceptance and effective date.

No public way agreement, franchise, or lease granted pursuant to the provisions of this title shall become effective unless and until the ordinance or other city action granting the same has become effective. Within 30 days after the effective date of the ordinance or other city action granting a public way agreement, franchise, or lease, or within such extended period of time as the council in its discretion may authorize, the applicant shall file with the city clerk an unconditional written acceptance of the public way agreement, franchise, or lease, in a form satisfactory to the city attorney, together with the bonds, insurance policies, and security fund required by this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.030 Police power.

In accepting and executing any public way agreement, franchise or lease, the grantee, franchisee, or lessee acknowledges that its rights thereunder are subject to the legitimate rights of the police power of the city to adopt and enforce general ordinances necessary to protect the safety, health, and welfare of the public, and agrees to comply with all applicable general laws enacted by the city pursuant to such power. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.040 Rules and regulations by the city.

In addition to the inherent powers of the city to regulate and control any public way agreement, franchise, or lease granted, the authority granted to the city by the Cable Act and the Telecommunications Act of 1996, and those powers expressly reserved by the city, or agreed to and provided for in any public way agreement, franchise, or lease, the right and power is hereby reserved by the city to promulgate such additional regulations as it may find

necessary in the exercise of its lawful powers giving due regard to the rights of grantees, franchisees, and lessees. Except as provided in this title, the foregoing does not allow for amendment by the city of material terms of any public way agreement, franchise, or lease granted without the written consent of the grantee, franchisee, or lessee. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.050 Location of facilities.

All facilities shall be constructed, installed, and located in accordance with the following terms and conditions, unless otherwise specified in a public way agreement, franchise, or lease agreement.

A. Unless otherwise provided in a public way agreement, franchise, or lease, a grantee, franchisee, or lessee with permission to occupy a public way must locate its cable or telecommunications facilities underground in accordance with ACC Title 18 and Chapter 13.32 ACC.

B. Any newcomer in the public way must bear the full cost of discovering the location of any existing conflicts, coordination of the engineering plans to acquire the approvals of parties already in the public way, and relocating and/or mitigating such conflicts with preexisting facilities in conflict with the plans of the newcomer.

C. Whenever the city requires, a grantee, franchisee, or lessee subject to this title, that currently occupies the public way shall relocate its facilities underground at no expense to the city. Such relocation shall be made concurrently with other planned work to minimize the disruption of the public ways as determined by the city engineer.

D. Should the available capacity of public ways prevent new uses in the future, all persons subject to this title shall

negotiate with any interested newcomer the means of creating new capacity as required by federal or state law. The parties shall arrive at a mutually supportable agreement and submit the same to the city for review and comment. The parties will incorporate any reasonable city requirements for approval, and resubmit the revised proposal for city council approval. If approved by the city council, the parties will bear all costs associated with the proposal, and obtain the necessary permits to execute the approved plan from the city in accordance with this title and Chapter 12.24 ACC. The city shall bear no costs associated with resolution of capacity shortages within the public ways. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.060 Compliance with One Number Locator Service.

All grantees, franchisees, and lessees shall, before commencing any construction in the public ways, comply with all regulations of Chapter 19.122 RCW, the One Number Locator Service. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.070 Construction permits.

All grantees of public way agreements, franchisees, and lessees of city properties are required to obtain construction permits, as required in Chapter 12.24 ACC, for installing utility, cable and telecommunications facilities. However, nothing in this title shall prohibit the city and a grantee, franchisee, or lessee from agreeing to alternative plan review, permit, and construction procedures for a public way agreement, franchise, or lease granted under this title, provided such alternative procedures provide substantially equivalent safeguards for responsible construction practices. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.080 Interference with the public ways.
No grantee, franchisee, or lessee may locate or maintain its utility, cable or telecommunications facilities so as to unreasonably interfere with the use of the public ways by the city, by the general public or by other persons authorized to use or be present in or upon the public ways. All such facilities which unreasonably interfere with the use of the city's public ways as determined by the public works director, shall be moved in accordance with provisions in ACC 20.10.130, by the grantee, franchisee, or lessee, at the grantee, franchisee, or lessee's cost, temporarily or permanently, as determined by the public works director. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.090 Damage to property.
No grantee, franchisee, or lessee, nor any person acting on behalf of a grantee, franchisee, or lessee shall take any action or permit any action to be taken which may impair or damage any city property, public ways of the city, other ways or other property, whether publicly or privately owned, located in, on or adjacent thereto. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.100 Notice of work.
Unless otherwise provided in a public way agreement, franchise, or lease agreement, no grantee, franchisee, or lessee, nor any person acting on behalf of the grantee, franchisee, or lessee shall commence any nonemergency work in or about the public ways of the city, other ways, or upon city property without 10 working days' advance written notice to the city which notice shall include the location of the work to be done, a detailed description of the work to be done, and a schedule for completion. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.110 Repair and emergency work.

In the event of an emergency, a grantee, franchisee, or lessee may commence such repair and emergency response work as required under the circumstances, provided the grantee, franchisee, or lessee shall notify the city in writing as promptly as possible, before such repair or emergency work commences or as soon thereafter as possible if advance notice is not practicable. The city may act without prior written notice in case of emergency. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.120 Maintenance of facilities.

Each grantee, franchisee, or lessee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.130 Abandonment, relocation or removal of facilities.

Within 30 days following written notice from the city, a grantee, franchisee, or lessee shall, at its sole expense, temporarily or permanently remove, relocate, change, or alter the position of any commercial utility, cable or telecommunications facilities within the public ways or upon city property whenever the city public works director shall have determined that such removal, relocation, change, or alteration is reasonably necessary for:

A. The construction, repair, maintenance, or installation of any city or other public improvement in or upon the public ways; and

B. The operations of the city, utility providers, or other governmental entity in or upon the public ways; and

C. Facilities are deemed by the city as abandoned due to failure to cure of the grantee, franchisee, or lessee.
However, in the event such relocation is required due to emergency repairs deemed necessary by the city, such relocation or moving shall be accomplished within 24 hours. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.140 Building moving.
Whenever any person shall have obtained permission from the city to use any street or public way for the purpose of moving any building, a grantee, franchisee, or lessee, upon seven calendar days' written notice from the city, shall raise or remove, at the expense of the person desiring to move the building, any of the grantee, franchisee, or lessee's utility wires, poles, or facilities which may obstruct the moving of such building; provided, that the person desiring to move the building shall comply with all requirements of the city for the moving of buildings. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.150 Removal of unauthorized facilities.
Within 30 days following written notice from the city, any commercial utility, telecommunications carrier, operator, lessee or other person who owns, controls, or maintains any unauthorized cable or telecommunications system, facility, or related appurtenances within the public ways or upon property of the city shall, at its own expense, remove such facilities or appurtenances from the public ways of the city. A utility, cable or telecommunications system or facility is unauthorized and subject to removal in the following circumstances:

A. Upon expiration or termination of the grantee, lessee, or franchisee's public way agreement, franchise, or lease;

B. Upon leaving any system or facility within the public ways or upon property of the city, any such property of a grantee, franchisee, or lessee shall be deemed abandoned if left in place 90 days after expiration or termination of a public way agreement, franchise, or lease;

C. If the system or facility was constructed or installed without the prior approval of a public way agreement, franchise or lease;

D. If the system or facility was constructed or installed without the prior issuance of a required construction permit;

E. If the system or facility was constructed or installed at a location not permitted by a public way agreement, franchise or lease.

Provided, however, that the city may, in its sole discretion, allow a grantee, franchisee, or lessee or other such persons who may own, control, use, or maintain commercial utility, cable or telecommunications facilities within the public ways of the city or upon city property to abandon such facilities in place. No facilities of any type may be abandoned in place without the express written consent of the city. Any plan for abandonment or removal of a grantee's, franchisee's, or lessee's facilities must be first approved by the public works director, and all necessary permits must be obtained prior to such work. Upon permanent abandonment in place of the facilities such facilities shall become the city's property, and such persons shall submit to the city an instrument in writing, to be approved by the city attorney, transferring to the city the ownership of such property. The provisions of this section shall survive the expiration, revocation, or termination of a

public way agreement, franchise, or lease granted under this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.160 Emergency removal or relocation of facilities.

The city retains the right and privilege to cut or move any commercial utility, cable or telecommunications facilities located within the public ways of the city and upon city property, as the city may determine to be necessary, appropriate or useful in response to any public health or safety emergency. The city shall not be liable to any utility, cable operator, telecommunications carrier, operator, or provider, or any other party for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the city's actions under this section. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.170 Damage to facilities.

Unless directly and proximately caused by the willful, intentional, or malicious acts by the city, the city shall not be liable for any damage to or loss of any commercial utility, cable, or telecommunications facilities upon city property or within the public ways of the city as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind on such city property or within the public ways by or on behalf of the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.180 Restoration of public ways, other ways, city property and public/private utility property.

A. When a grantee, franchisee, lessee, or any person acting on behalf such persons, does any work in or affecting any public ways, other ways, city property, or public/private utilities located in the public ways, it shall, at its own expense, promptly remove any obstructions therefrom and

restore such ways or property to as good a condition as existed before the work was undertaken, unless otherwise directed by the city.

B. If weather or other conditions do not permit the complete restoration required by this section, or other city codes, regulations or policies, the grantee, franchisee, or lessee shall temporarily restore the affected public ways, other ways, or property. Such temporary restoration shall be at the grantee's, franchisee's, or lessee's sole expense and the grantee, franchisee, or lessee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

C. A grantee, franchisee, lessee or other person acting on behalf of such persons shall use suitable barricades, flags, flagmen, lights, flares, and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle, or property by reason of such work in or affecting such public ways, other ways, or property.

D. The public works director shall be responsible for inspection and final approval of the condition of the public ways, other ways, and city property following any construction and restoration activities therein. Further, the provisions of this section shall survive the expiration, revocation, or termination of a public way agreement, franchise, lease, or other agreement granted pursuant to this title or Chapter 12.24 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.190 Facilities maps.

Each grantee, franchisee, and lessee shall provide the city with a map or maps accurately reflecting the horizontal and

vertical location and configuration of all of their commercial utility or telecommunications facilities within the public ways and upon city property. Each grantee, franchisee, and lessee shall provide the city with updated maps annually or upon written request by the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.200 Duty to provide information.

Within 10 working days of a written request from the city, each grantee, franchisee, or lessee shall furnish the city with information sufficient to demonstrate:

A. That the grantee, franchisee, or lessee has complied with all requirements of this title; and

B. That all sales, utility and/or telecommunications or other taxes or assessments due the city in connection with the commercial utility, cable, or telecommunications services and facilities provided by the grantee, franchisee, or lessee have been properly collected and paid by the grantee, franchisee, or lessee.

All books, records, maps and other documents, maintained by the grantee, franchisee, or lessee with respect to its utility or telecommunications facilities within the public ways and upon city property shall be made available for inspection by the city at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require a grantee, franchisee, or lessee to violate state or federal law regarding subscriber privacy, nor shall this section be construed to require a grantee, franchisee, or lessee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature. Such information shall be held in strict confidence, as allowed by law, by the city

and used only for the purpose stated herein. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.210 Leased capacity.

A grantee, franchisee, or lessee shall have the right to offer or provide capacity or bandwidth to its customers consistent with such permit, franchise, or lease; provided:

A. The grantee, franchisee, or lessee shall furnish the city with a copy of any such lease or agreement between the grantee, franchisee, or lessee and the customer or sub-lessee or provide to the city's finance director sufficient information to determine whether the lessee or customer is subject to city taxes or assessments; and

B. The sub-lessee fulfills all requirements of Chapters 5.82 and 5.88 ACC regarding the reporting of all revenues subject to city taxes and assessments; and

C. Lessee must comply with the city's registration requirements in Chapter 5.84 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.220 Insurance.

Unless otherwise provided in a public way agreement, franchise, or lease agreement, each grantee, franchisee, or lessee shall, as a condition of the permit or public way agreements, franchises, or leases, secure, and maintain the following liability insurance policies insuring both the grantee, franchisee, or lessee and the city, and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants, and volunteers as additional insureds against claims for injuries to persons or damages to property which may arise from or in connection with the exercise of the rights, privileges, and authority granted to the grantee, franchisee, or lessee:

A. Comprehensive general liability insurance, written on an occurrence basis, with limits not less than:

1. Five million dollars for bodily injury or death to each person;

2. Five million dollars for property damage resulting from any one accident; and

3. Five million dollars for all other types of liability;

B. Automobile liability for owned, nonowned and hired vehicles with a limit of $3,000,000 for each person and $3,000,000 for each accident;

C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than $1,000,000;

D. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than $3,000,000;

E. The liability insurance policies required by this section shall be maintained by the grantee, franchisee, or lessee throughout the term of the public way agreement, franchise, or lease, and such other period of time during which the grantee, franchisee, or lessee is operating without a public way agreement, franchise, or lease hereunder, or is engaged in the removal of its telecommunications facilities. The grantee, franchisee, or lessee shall provide an insurance certificate, together with an endorsement naming the city, and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants, and volunteers as additional insureds, to the city prior to the

commencement of any work or installation of any utility or telecommunications facilities pursuant to said public way agreement, franchise, or lease. Any deductibles or self-insured retentions must be declared to and approved in writing by the city prior to the franchise becoming effective. Payment of deductibles and self-insured retentions shall be the sole responsibility of the grantee, franchisee, or lessee. The insurance certificate required by this section shall contain a clause stating that coverage shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability. The grantee, franchisee, or lessee's insurance shall be primary insurance as respects the city, its officers, officials, employees, agents, consultants, and volunteers. Any insurance maintained by the city, its officers, officials, employees, consultants, agents, and volunteers shall be in excess of the grantee, franchisee, or lessee's insurance and shall not contribute with it;

F. In addition to the coverage requirements set forth in this section, each such insurance policy shall contain the following endorsement:

> It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until 60 days after receipt by the City, by registered mail, (return receipt requested) of a written notice addressed to the City Clerk of such intent to cancel or not to renew.

G. Within 30 days after receipt by the city of said notice, and in no event later than 15 days prior to said cancellation or intent not to renew, the grantee, franchisee, or lessee shall obtain and furnish to the city replacement insurance policies meeting the requirements of this section. Any lapse in the required insurance coverage shall be cause for

termination of any public way agreement, franchise, or lease. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.230 General indemnification.

No public way agreement, franchise, or lease shall be deemed to be granted under this title unless it includes an indemnity clause substantially conforming to the following:

> The grantee, franchisee, or lessee hereby releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected and appointed officials, officers, employees, agents, representatives, engineers, and consultants from any and all claims, costs, judgments, awards, or liability to any person, including claims by the grantee, franchisee, or lessee's own employees to which the grantee, franchisee, or lessee might otherwise be immune under RCW Title 51, arising from injury or death of any person or damage to property of which the negligent acts or omissions of the grantee, franchisee, or lessee, its agents, servants, officers, or employees in performing under this Public Way Agreement, franchise, or lease are the proximate cause. The grantee, franchisee, or lessee further releases, covenants not to bring suit and agrees to indemnify, defend and hold harmless the City, its elected and appointed officials, officers, employees, agents, representatives, engineers, and consultants from any and all claims, costs, judgments, awards, or liability to any person including claims by the grantee, franchisee, or lessee's own employees, including those claims to which the grantee, franchisee, or lessee might otherwise have immunity under RCW Title 51, arising against the City solely by virtue of the City's ownership or

control of the rights-of-way or other public properties, by virtue of the grantee, franchisee, or lessee's exercise of the rights granted herein, or by virtue of the City's permitting the grantee, franchisee, or lessee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the grantee, franchisee, or lessee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this Public Way Agreement, franchise, or lease, or pursuant to any other permit or approval issued in connection with this Public Way Agreement, Franchise, or Lease. This covenant of indemnification shall include, but not be limited by this reference, claims against the City arising as a result of the negligent acts or omissions of the grantee, franchisee, or lessee, its agents, servants, officers, or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work in any public right-of-way or other public place in performance of work or services permitted under this Public Way Agreement, Franchise, or Lease.

Inspection or acceptance by the City of any work performed by the grantee, franchisee, or lessee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation.

In the event that the grantee, franchisee, or lessee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to the indemnification clauses contained herein, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties shall agree to decide the matter), to have been a wrongful refusal on the part of the grantee, franchisee, or lessee, then the grantee, franchisee, or lessee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees and reasonable attorneys' fees and the reasonable costs of the City, including reasonable attorneys' fees of recovering under this indemnification clause.

In the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the grantee, franchisee, or lessee, and the City, its officers, employees and agents, the grantee, franchisee, or lessee's liability hereunder shall be only to the extent of the grantee, franchisee, or lessee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the grantee, franchisee, or lessee's waiver of immunity under RCW Title 51, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties.

The provisions of this section shall survive the expiration or termination of any Public Way Agreement, Franchise, or Lease agreement.

Notwithstanding any other provisions of this Title, the grantee, franchisee, or lessee assumes the risk of damage to its facilities located in the City's public ways, rights-of-way, easements, and property from activities conducted by the City, its officers, agents, employees, and contractors. The grantee, franchisee, or lessee releases and waives any and all claims against the City, its officers, agents, employees, or contractors for damage to or destruction of the grantee, franchisee, or lessee's facilities caused by or arising out of activities conducted by the city, its officers, agents, employees, and contractors, in the public ways, rights-of-way, easements, or property subject to this Public Way Agreement, Franchise, or Lease, except to the extent any such damage or destruction is caused by or arises from the sole negligence or any willful or malicious action on the part of the City, its officers, agents, employees, or contractors. The grantee, franchisee, or lessee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of the grantee, franchisee, or lessee's facilities as the result of any interruption of service due to damage or destruction of the user's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees, or contractors, except to the extent any such damage or destruction is caused by or arises from the sole negligence or any willful or malicious actions on the part of the City, its officers, agents, employees, or contractors.

(Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.240 Performance and construction surety.
Before a public way agreement, franchise, or lease granted pursuant to this title is effective, and as necessary thereafter, the grantee, franchisee, or lessee shall provide and deposit such moneys, bonds, letters of credit, or other instruments in form and substance acceptable to the city as may be required by this title or by an applicable public way agreement, franchise, or lease agreement. All performance bonds for grantees, franchisees, and lessees shall satisfy the minimum standards established by the public works department at the time of the grantees', franchisees', and lessees' application. (Construction bond section(s) of Standard Specifications for Road, Bridge, and Municipal Construction for Washington State Department of Transportation and American Public Works Association).
Construction bonds sureties shall be provided as required by Washington State laws. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.250 Security options.
In order to secure the conditions agreed to in any agreement negotiated under this title, for the full term of such agreements, each grantee, franchisee, or lessee shall establish a permanent security bond, assignment of funds, or an unconditional letter of credit from a Washington State bank with the city by either providing the city engineer a standing warranty bond or by depositing the amount of funds as follows in a Washington state bank utilizing the city's standard assignment form, or by provision of the letter of credit. The amount of security shall be 10 percent of the city engineer's estimate of the performance bond amount (ACC 20.10.260) based upon the total scope of work proposed within the public ways, or $50,000, whichever is less, or such lesser amount determined by the public works director to be sufficient. The security shall be maintained at the sole expense of the grantee, franchisee, or lessee so long

as any of the grantee, franchisee, or lessee's utility, cable or telecommunications facilities are located within the public ways of the city or upon city property and until released by the city. In the event a security involves a bank, the grantee, franchisee, or lessee is responsible for negotiating any interest that may accrue to the account during the duration of effect. Should the agreement being secured be terminated, the finance director will coordinate with other departments and determine if any portion of the security may be released by the city.

A. The security shall secure the full and complete performance of the requirements of this title, including any costs, expenses, damages, or loss the city pays or incurs, including civil penalties, because of any failure attributable to the grantee, franchisee, or lessee to comply with any applicable legal requirements including, but not limited to, the codes, ordinances, rules, regulations, or permits of the city.

B. Before the city executes on the security bond or any sums are withdrawn from the security fund, the city shall give written notice to the grantee, franchisee, or lessee:

1. Describing the act, default or failure to be remedied, or the damages, costs or expenses which the city has incurred by reason of grantee, franchisee, or lessee's act, default, or failure;

2. Providing a reasonable opportunity for grantee, franchisee, or lessee to first remedy the existing or ongoing default or failure, if applicable;

3. Providing a reasonable opportunity for grantee, franchisee, or lessee to pay any moneys due the city before the city executes the bond or withdraws the

amount thereof from the security fund, if applicable; and

4. That the grantee, franchisee, or lessee will be given an opportunity to review the act, default or failure described in the notice with the city or his or her designee.

C. Grantees, franchisees and lessees shall replenish the security bond or fund within 14 calendar days after written notice from the city that there is a deficiency in the amount of the bond or fund. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.260 Performance bond.

All performance bonds provided in accordance with this title shall comply with the minimum standards in Chapter 12.24 ACC. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.270 Coordination of construction activities.

ACC 20.10.100 notwithstanding, all grantees, franchisees and lessees, are required to cooperate with the city and with each other.

A. By November 15th of each year, grantees, franchisees and lessees shall provide the city with a schedule of their proposed construction activities which may affect the public ways in any manner.

B. Each grantee, franchisee and lessee shall meet with the city, other grantees and franchisees and users of the public ways annually or as determined by the city to schedule and coordinate construction which may affect the public ways in any manner.

C. All construction locations, activities and schedules shall be coordinated, as required by the city public works director, to minimize public inconvenience, disruption or damages.

D. Each grantee, franchisee and lessee shall be available to city staff employees of a city department having jurisdiction over their respective activities 24 hours a day, seven days a week, regarding problems or complaints resulting from the attachment, installation, operation, use, maintenance, or removal of commercial utility or telecommunications system facilities. The city must be able to contact by telephone the network control center of each grantee, franchisee and lessee. A telephone number at which an employee can be reached 24 hours a day, seven days a week regarding such problems or complaints must be provided by each grantee, franchisee and lessee before any public way agreement, franchise, or lease is effective. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.280 Assignments or transfers of public way agreements, franchises, or leases.

The assignment or transfer of any business registration, public way agreement, franchise or lease subject to this title, may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, franchisee, or lessee, by operation of law or otherwise, without the prior written consent of the city, which consent shall not be unreasonably withheld or delayed, except as expressed by ordinance and then only on such reasonable conditions as may be prescribed therein.

A. No public way agreement, franchise, or lease, subject to this title, shall be assigned or transferred before construction of such systems has been completed to the city's satisfaction without prior written consent of the city,

which consent shall not be unreasonably withheld or delayed, except as expressed by ordinance and then only on such reasonable conditions as may be prescribed therein.

B. The grantee, franchisee, or lessee and the proposed assignee or transferee of the public way agreement, franchise, or lease shall provide and certify the following information to the city not less than 90 calendar days prior to the proposed date of transfer:

1. Complete information setting forth the nature, terms and conditions of the proposed transfer or assignment relating to the public way agreement, franchise or lease;

2. All information required by a public way agreement, franchise, or lease applicant pursuant to this title with respect to the proposed transferee or assignee;

3. Any other information reasonably required by the city; and

4. A nonrefundable application fee in the amount of $75.00.

C. No transfer shall be approved unless the assignee or transferee meets the requirements contained in ACC 20.04.040(A) and (I) and can comply with the requirements of the public way agreement, franchise, or lease.

D. Unless otherwise provided in a public way agreement, franchise, or lease agreement, the grantee, franchisee, or lessee shall reimburse the city for all direct and indirect costs and expenses reasonably incurred by the city in considering a request to transfer or assign a public way

agreement, franchise, or lease. No approval shall be deemed approved until all such costs and expenses have been paid.

E. Any transfer or assignment of a public way agreement, franchise, or lease without prior written approval of the city under this section or pursuant to a public way agreement, franchise, or lease agreement shall be void and is cause for termination of the public way agreement, franchise, or lease. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.290 Transactions affecting control of public way agreements, franchises, or leases.

Any transactions which singularly or collectively result in a change of 50 percent or more of the ownership or working control of any grantee, franchisee, or lessee of the ownership or working control of a utility, cable, or telecommunications system, of the ownership or working control of affiliated entities having ownership or working control of the grantee, franchisee, or lessee or of a telecommunications system, or of control of the capacity or bandwidth of the grantee, franchisee, or lessee's utility, cable, or telecommunications system, facilities or substantial parts thereof, shall be considered an assignment or transfer requiring city approval pursuant to ACC 20.10.280. Transactions between affiliated entities are not exempt from the required city approval. A grantee, franchisee, or lessee shall promptly notify the city in writing prior to any proposed change in, or transfer of, or acquisition by any other party of control of a grantee's, franchisee's, or lessee's company. Every change, transfer, or acquisition of control of a grantee's, franchisee's, or lessee's company shall cause a review of the proposed transfer. In the event that the city council adopts a resolution or other appropriate order opposing such change, transfer or acquisition of control has been effected, the city may

terminate the public way agreement, franchise, or lease. City approval shall not be required for mortgaging purposes or if said transfer is from a grantee, franchisee, or lessee to another person or entity controlling, controlled by, or under common control with a grantee, franchisee, or lessee. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.300 Revocation or termination of public way agreements, franchises, or leases.

A public way agreement, franchise, or lease granted by the city to use or occupy public ways of the city or city property may be terminated or revoked for the following reasons:

A. Construction or operation in the city or in the public ways of the city or upon city property without a public way agreement, franchise, or lease;

B. Construction or operation at an unauthorized location;

C. Unauthorized substantial transfer of control of a grantee, franchisee, or lessee;

D. Unauthorized assignment of a public way agreement, franchise, or lease;

E. Unauthorized sale, assignment or transfer of a grantee's, franchisee's, or lessee's public way agreement, franchise, lease, assets, or a substantial interest therein;

F. Misrepresentation or lack of candor by or on behalf of a grantee, franchisee, or lessee in any application or written or oral statement upon which the city relies in making the decision to approve, review or amend any public way agreement, franchise, or lease pursuant to this title;

G. Abandonment of cable or telecommunications facilities in the public ways or upon city property;

H. Failure to relocate or remove facilities as required in this title;

I. Failure to pay taxes, compensation, fees, assessments, or costs when and as due to the city;

J. Insolvency or bankruptcy of the grantee, franchisee, or lessee;

K. Violation of any material provision of this title; and

L. Violation of the material terms of a public way agreement, franchise, or lease agreement. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.310 Notice and duty to cure.

In the event that the city believes that grounds exist for termination or revocation of a public way agreement, franchise, or lease, the grantee, franchisee, or lessee shall be given written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee, franchisee, or lessee a reasonable period of time not exceeding 30 days to correct the violation or furnish evidence as to:

A. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance; or

B. That rebuts the alleged violation or noncompliance; or

C. That it would be in the public interest to impose some penalty or sanction less than revocation. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.320 Public hearing.
In the event that a grantee, franchisee, or lessee fails to respond to the notice described in ACC 20.10.310 pursuant to the procedures set forth therein, or in the event that the alleged violation is not remedied within the prescribed period of time after notification of the alleged violation pursuant to ACC 20.10.310, the city council shall schedule a public hearing to investigate the violation. Such public hearing shall be held at the next regularly scheduled hearing of the city council which is scheduled at a time which is no less than five business days therefrom. The city shall notify the grantee, franchisee, or lessee of the time and place of such public hearing and provide the grantee, franchisee, or lessee with an opportunity to be heard. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.330 Standards for revocation or lesser sanctions.
If the city council determines that a grantee, franchisee, or lessee willfully violated or failed to comply with any of the provisions of this title or any provision of a public way agreement, franchise, or lease granted under this title, or through willful misconduct or gross negligence failed to heed or comply with any notice given the grantee, franchisee, or lessee by the city under the provisions of this title, then the grantee, franchisee, or lessee shall, at the election of the city council, forfeit all rights conferred under the public way agreement, franchise, or lease, and the public works agreement, franchise, or lease may be revoked, terminated, or annulled by the city council. The city council may elect, in lieu of revocation, termination, or annulment, and without any prejudice to any of its other legal rights and remedies, to pursue other remedies,

including obtaining an order from the superior court having jurisdiction compelling the grantee, franchisee, or lessee to comply with the provisions of this title and any public way agreement, franchise, or lease granted hereunder, and to recover reasonable and documented damages and costs incurred by the city by reason of the grantee, franchisee, or lessee's failure to comply. The city council shall utilize, but is not limited to, the following factors in analyzing the nature, circumstances, extent, and gravity of any violation(s) in making its determination under this section:

A. Whether the misconduct was egregious;

B. Whether substantial harm resulted;

C. Whether the violation was intentional;

D. Whether there is a history of prior violations of the same or other requirements;

E. Whether there is a history of overall compliance;

F. Whether the violation was voluntarily disclosed, admitted or cured. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.340 Civil penalties.

A. Any person, and the officers, directors, managing agents, or partners of any corporation, firm, partnership or other organization or business violating or failing to comply with any of the provisions of this title shall be subject to a penalty in an amount not less than $100.00 nor more than $1,000 per day for each violation from the date of each violation until compliance is achieved.

B. In addition to any penalty which may be imposed by the city council, any person violating or failing to comply with any of the provisions of this title shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to the violation.

C. The violator may show the city council as full or partial mitigation:

1. That the violation giving rise to the action was caused by the willful act, or neglect, or abuse of another; or

2. That correction of the violation was commenced promptly upon receipt of the notice thereof, but that full compliance within the time specified was prevented by inability to obtain necessary materials or labor, inability to gain access to the subject structure, or other condition or circumstance beyond the control of the violator.

D. The penalties which may be imposed by this section shall be collected by civil action brought by the city if not paid timely after penalty assessment by the city council. The public works director or designee shall notify the finance director in writing of the name of any person subject to the penalty, and the finance director shall take appropriate action to collect the penalty. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.350 Enforcement.

Subject to applicable federal and state law, in the event the city council, after such public hearing, determines that a grantee, franchisee, or lessee is in default of any provision of a public way agreement, franchise, or lease, it may:

A. Require foreclosure on all or any part of any security provided under this title, or a specific public way agreement, franchise, or lease, if any, including without limitation, any bonds or other surety; provided, however, the foreclosure shall only be in such a manner and in such amount as the city reasonably determines is necessary to remedy the default;

B. Call for commencement of an action at law for monetary damages or other equitable relief;

C. After the expiration of said 30-day period to cure violation (ACC 20.10.310), the city may be directed to act to remedy the violation and charge the reasonable and documented costs and expenses of such action to the grantee, franchisee, or lessee;

D. In the case of a material breach of the public way agreement, franchise, or lease, declare the public way agreement, franchise, or lease to be terminated or revoked;

E. Seek specific performance of any provision, which reasonably lends itself to such remedy, as an alternative to damages;

F. Grantees, franchisees, or lessees shall not be relieved of any obligations to comply promptly with any provision of a public way agreement, franchise, or lease by reason of any failure of the city to promptly enforce compliance;

G. In addition to other remedies provided herein, if a grantee, franchisee, or lessee is not in compliance with requirements of this title, and if a good faith dispute does not exist concerning such compliance, the city may place a

moratorium on issuance of any pending permits until compliance is achieved;

H. A grantee, franchisee, or lessee shall not be held in default or noncompliance with the provisions of a public way agreement, franchise, or lease nor suffer any enforcement or penalty relating thereto, where such noncompliance or alleged defaults are caused by strikes, acts of God, power outages, or other events reasonably beyond its ability to control;

I. Assess civil penalties pursuant to ACC 20.10.340;

J. The city may seek legal or equitable relief to enjoin any acts or practices and abate any condition which constitutes or will constitute a violation of the applicable provisions of this title when civil penalties are inadequate to effect compliance;

K. In addition to the penalties set forth in this section, violation of the terms of this title may also result in the revocation or termination of any public way agreement, franchise, approval, lease, or permit issued or granted hereunder, as set forth in ACC 20.10.300 through 20.10.340. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.360 Other remedies.

Nothing in this title shall be construed as limiting any judicial remedies that the city may have, at law or in equity, for enforcement of this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.370 Venue of any court action.

All public way agreements, franchises, and leases subject to this title shall be governed and construed by and in accordance with the laws of the state of Washington. In the

event that suit is brought by a party to a public way agreement, franchise, or lease subject to this title, the parties agree that jurisdiction of such action shall be vested exclusively in the King County Superior Court for the State of Washington, or in the United States District Court for the Western District of Washington located in Seattle, Washington. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.380 Action by the FCC.

In the event the FCC promulgates more stringent notice requirements, technical standards, consumer protection or consumer services requirements than are contained in agreements or franchises subject to this title, those more stringent requirements shall prevail. The city shall give reasonable written notice when, in their determination, that has occurred. Grantees, franchisees, and lessees shall retain and not waive any or all rights and privileges as afforded either under existing contracts or agreements or pursuant to federal law or FCC regulations to complain and/or appeal such a determination. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.390 Incorporation by reference.

The provisions of this chapter shall be incorporated by reference in any public way agreement, franchise, or lease approved hereunder. The provisions of this chapter shall be incorporated by reference in any proposal submitted and accepted by the city in the applicable public way agreement, franchise, or lease. However, in the event of any conflict between the proposal, this chapter, and the public way agreement, franchise, or lease, the public way agreement, franchise, or lease shall be the prevailing document. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.400 Notice of entry on private property.

If directed by the city, a grantee, franchisee, or lessee shall, at least 24 hours prior to entering private property or streets or public easements adjacent to or on such private property to perform new construction or reconstruction, provide a notice indicating the nature and location of the work to be performed. The notice shall be physically posted, at no expense to the city or private property owner or resident, upon the affected property by the grantee, franchisee, or lessee. A door hanger may be used to comply with the notice and posting requirements of this section. A grantee, franchisee, or lessee shall make a good faith effort to comply with the property owner/resident's preferences, if any, on location or placement of underground installations (excluding aerial cable lines utilizing existing poles and existing cable paths), consistent with sound engineering practices; provided, however, that nothing in this title shall permit a grantee or franchisee to unlawfully enter or construct improvements upon the property or premises of another. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.410 Safety requirements.

A grantee, franchisee, or lessee, in accordance with applicable federal, state, and local safety requirements shall, at all times, employ ordinary care and shall install and maintain and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury, or nuisance to the public and/or workers. All structures and all lines, equipment and connections in, over, under, and upon the streets, sidewalks, alleys, and public ways or places of a permit, public way agreement, franchise, or lease area, wherever situated or located, shall at all times be kept and maintained in a safe, suitable condition, and in good order and repair. The city reserves the general right to see that the telecommunications systems of a grantee, franchisee, or

lessee are constructed and maintained in a safe condition. If a violation of the National Electrical Safety Code or other applicable regulation is found to exist by the city, the city will, after discussions with a grantee, franchisee, or lessee, establish a reasonable time frame for a grantee, franchisee, or lessee to make necessary repairs. If the repairs are not made within the established time frame, the city may make the repairs itself or have them made and collect all reasonable costs thereof from a grantee, franchisee, or lessee. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.420 Most favored community.

In the event that a grantee, franchisee, or lessee enters into any agreement, franchise or other understanding with any other city, town or county in the state of Washington which provides terms or conditions more favorable to the city, town or county than those provided in its agreement with the city, such as, but not limited to, free or reduced fee hookups, access or service, the city shall be entitled to request at the city's option, and the grantee, franchisee, or lessee in question shall be required to execute, an amendment to its agreement which incorporates the more favorable terms and conditions at the grantee's, franchisee's, or lessee's lowest comparable rate applicable to any government body or municipality in the state of Washington. (See ACC 20.06.180(N), Best Rates). (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.430 Compliance with zoning standards.

All applications for leases, franchises, and public way agreements under this title will comply with the city zoning regulations and siting standards in ACC Title 18. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.440 Unfunded mandate.

The city intends that no federal or state requirement to promote the deregulation of utilities or telecommunications shall become an unfunded mandate requiring funding support from the city over and above its routine operations and maintenance budget to maintain the public ways. Therefore, except as expressly provided to the contrary, all costs incurred by a grantee, franchisee, or lessee in complying with the terms and conditions of any agreement subject to this title or any applicable laws, ordinances, codes, rules, regulations and/or orders or any action thereunder shall be the sole responsibility of the respective grantee, franchisee, or lessee and shall not be the responsibility of or charged to the city. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.450 Care of trees along streets.

Upon prior written approval of the city and in accordance with city ordinances, any grantee, franchisee, or lessee shall have the authority to trim trees upon and overhanging streets, public ways and places in the franchise area so as to prevent the branches of such trees from coming in physical contact with the facilities of the respective grantee, franchisee, or lessee. The grantee, franchisee, or lessee shall be responsible for debris removal from such activities. If such debris is not removed within 24 hours, the city may, at its sole discretion, remove such debris and charge the grantee, franchisee, or lessee for the cost thereof. This section does not, in any instance, grant automatic authority to clear vegetation for purposes of providing a clear path for radio signals. Any such general vegetation clearing will require a city land clearing permit. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.460 Use of utility poles and facilities of others.
Grantees and franchisees may seek to contract with the city or any appropriate board or agency thereof or with the holder or owner of any utility franchise in the city for the use, rental or lease of its or their poles and other structures and facilities for the purpose of extending, carrying or laying telecommunications facilities, electronic conductors and other facilities and appurtenances necessary or desirable in conjunction with the operation of its telecommunications system. The city agrees that any public utility owning or controlling such poles or other structures or facilities may, without amendment to its franchise, allow, and is encouraged to allow, grantees and franchisees to make such use thereof pursuant to any agreement reached between the affected parties. City-owned poles are limited to street light and traffic signal poles which generally are not intended for use by others. The city reserves the right to determine on a case-by-case basis that particular circumstances require that a certain city-owned pole is not appropriate for use. No grantee or franchisee will utilize any city-owned poles prior to approval by the city engineer. Any compensation for uses of city-owned poles will be based upon the prevailing market rates for similar uses in the region. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.470 Use of poles and facilities by city.
With respect to poles and trenches which are facilities and which are (1) wholly owned by a franchisee or grantee, and (2) within the franchise area, the city, subject to franchisee's or grantee's prior written consent, may install and maintain city-owned overhead facilities upon such poles, and conduits in open trenches, for police, fire, illumination, and other noncommercial communications purposes, subject to the following:

A. Such installation and maintenance shall be completed at the city's expense;

B. The franchisee or grantee shall have no obligation under the indemnification provisions of this franchise or public way agreement for the installation or maintenance of such city-owned facilities or conduits;

C. Nothing herein shall require the franchisee or grantee to bear any cost or expense in connection with such installation and maintenance of city-owned facilities or conduits, nor shall such city installation delay or adversely effect franchisee's or grantee's construction schedule;

D. In no case shall the city attach to or come into contact with grantee's or franchisee's equipment. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

20.10.480 Administration.

The public works director or his/her designee shall administer all public way agreements and franchises subject to this title, and the finance director or his/her designee shall administer all leases subject to this title. (Ord. 5271 § 1, 1999; Ord. 5034 § 1, 1998.)

APPENDIX F

ORDINANCE NO. 1200

AN ORDINANCE OF THE CITY OF DES MOINES, WASHINGTON, relating to telecommunications; establishing requirements for telecommunication carriers and providers and standards for the granting and renewal of telecommunications franchises; providing for the regulation of use of public ways, providing for insurance, bonding and construction standards for telecommunications facilities located in public ways; establishing procedures for appeals of administrative decisions regarding telecommunications facilities; providing for enforcement of this ordinance; establishing requirements for antennas and personal wireless telecommunication facilities, including a purpose statement, definitions, exemptions, site selection criteria, priority of locations, priority on city property, co-location and design criteria, permit inspection requirements and landscaping requirements, non-use and abandonment provisions, third party review and remedies; and adding a new Title 20 to the Des Moines Municipal Code.

WHEREAS, pursuant to RCW 35A.47.040, RCW 80.35.040 and other lawful authority, the city of Des Moines has the authority to regulate the use of its streets and other municipal property, and

WHEREAS, the city council finds that an increasing number of telecommunication carriers and providers have requested access to and the use of public ways and public property, and

WHEREAS, RCW 35A.11.020 grants cities broad authority to regulate the use of the public rights-of way, and

WHEREAS, RCW 35A.47.040 grants cities broad authority to grant non-exclusive franchise agreements, and

WHEREAS, RCW 35A.82.020 authorizes code cities to impose business licensing requirements and excises upon business transacted within such a city to the extent permitted by the general laws, and

WHEREAS, Congress has adopted the Telecommunications Act of 1996 (hereinafter the "Act") in order to encourage the development of high-technology communications systems through increased competition among communications companies, and

WHEREAS, the Act provides for the removal of regulatory barriers, rate deregulation and relaxation of certain anti-trust provisions in an attempt to achieve this goal, and

WHEREAS, the Act is anticipated to have a significant effect on the range and type of services that telecommunications carriers will be delivering via cable and wireless technologies, and

WHEREAS, the changes proposed in this ordinance have been processed in accordance with the requirements of the State Environmental Policy Act (SEPA), a final determination of nonsignificance was issued by the responsible official, and the appropriate comment period has expired, and

WHEREAS, by motion regularly passed, the Des Moines city council scheduled a public hearing for September 11, 1997 to consider the textual code amendment contained in this ordinance, and

WHEREAS, notice of the public hearing was given to the public in accordance with law and a public hearing was held on September 11, 1997 and all persons wishing to be heard were heard, and

WHEREAS, the Act contains numerous provisions which directly affect local taxation, zoning, franchise authority and public ways management, and

WHEREAS, the Act will likely place additional demands on the use of the city's public ways and public property, and

WHEREAS, section 704 of the federal Telecommunications Act of 1996, 47 USC Sec. 332(c)(7), provides that local governments may, pursuant to their inherent zoning authority, regulate the placement, construction, and modification of personal wireless telecommunications service facilities, provided that the local governments do not unreasonably discriminate among providers of functionally equivalent services, or prohibit or have the effect of prohibiting the provision of personal wireless services, and

WHEREAS, the city council finds that personal wireless service facilities often require large structures or towers, whose height and footprint may not be compatible, as a matter of sound urban planning, with adjoining residential uses, and

WHEREAS, the city council further finds that the public interest is best served by enacting specific siting regulations which will provide for placement of personal wireless facilities in areas least likely to negatively affect residential property, and

WHEREAS, the city is in the process of and will continue to identify potential sites which will allow for the placement of personal wireless telecommunications facilities subject to the criteria enumerated herein and elsewhere in city ordinances, and

WHEREAS, the city currently has regulations which do not take into account the provisions of the Act, and

WHEREAS, the city council finds that the provisions contained in this ordinance are appropriate and necessary for the preservation of the public health, safety and welfare; now therefore,

THE CITY COUNCIL OF THE CITY OF DES MOINES DO ORDAIN AS FOLLOWS:

TITLE 20
Telecommunications

Chapter 20.01. - Purpose and General Provisions

Sec. 1. Adoption of Title 20, Telecommunications. The city council hereby adopts a new Title 20, Telecommunications, to the Des Moines Municipal Code.

Sec. 2. Purpose. The purpose of this chapter is to:

(1) Establish a local policy concerning telecommunications providers and services;

(2) Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of telecommunications providers and services;

(3) Promote competition in telecommunications;

(4) Minimize unnecessary local regulation of telecommunications providers and services;

(5) Encourage the provision of advanced and competitive telecommunications services on the widest possible basis to the businesses, institutions and residents of the city;

(6) Permit and manage reasonable access to the public ways of the city for telecommunications purposes on a competitively neutral basis;

(7) Conserve the limited physical capacity of the public ways held in public trust by the city;

(8) Assure that the city's current and ongoing costs of granting and regulating private access to and use of the public ways are fully paid by the persons seeking such access and causing such costs;

(9) Secure fair and reasonable compensation to the city and the residents of the city, in a non-discriminatory manner, for permitting private use of the public ways;

(10) Assure that all telecommunications carriers providing facilities or services within the city comply with the ordinances, rules and regulations of the city;

(11) Assure that the city can continue to fairly and responsibly protect the public health, safety and welfare;

(12) Enable the city to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development.

Sec 3. Definitions.

(1) Use of words and phrases. As used in this ordinance, unless the context or subject matter clearly

requires otherwise, the words or phrases defined in this section shall have the indicated meanings.

(2) "Abandonment" means: (1) to cease operation for a period of sixty (60) or more consecutive days; (2) to reduce the effective radiated power of an antenna by seventy-five percent for sixty (60) or more consecutive days; (3) to relocate an antenna at a point less than eighty (80) percent of the height of an antenna support structure; or (4) to reduce the number of transmissions from an antenna by seventy-five percent for sixty (60) or more consecutive days.

(3) "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.

(4) "Antenna" means any exterior apparatus designed for telephonic, radio, data, Internet, or television communications through the sending and/or receiving of electromagnetic waves, and includes equipment attached to a tower or building for the purpose of providing personal wireless services, including unlicensed wireless telecommunications services, wireless telecommunications services utilizing frequencies authorized by the Federal Communications Commission for "cellular", "enhanced specialized mobile radio" and "personal communications services", telecommunications services, and its attendant base station.

(5) "Antenna height" means the vertical distance measured from the base of the antenna support structure at grade to the highest point of the structure even if said highest point is an antenna. Measurement of tower height shall include antenna, base pad, and other

appurtenances and shall be measured from the finished grade of the parcel. If the support structure is on a sloped grade, then the average between the highest and lowest grades shall be used in calculating the antenna height.

(6) "Antenna support structure" means any pole, telescoping mast, tower, tripod, or other structure which supports a device used in the transmitting or receiving of radio frequency signals.

(7) "Applicant" means any provider or any person, partnership, or company who files an application for any permit necessary to install, maintain, or remove a personal wireless service facility within the city.

(8) "Cable acts" means the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, as amended by portions of The Telecommunications Act of 1996, and as hereafter amended.

(9) "Cable operator" means a telecommunications carrier providing or offering to provide "cable service" within the city as that term is defined in the cable acts.

(10) "Cable service" shall have the same meaning as defined in the cable acts.

(11) "Camouflaged" means a personal wireless service facility that is disguised, hidden, or integrated with an existing structure that is not a monopole or tower, or a personal wireless service facility that is placed within an existing or proposed structure or, new

structure, tower, or mount within trees so as to be significantly screened from view.

(12) "Cell site" or "site" means a tract or parcel of land that contains personal wireless service facilities including any antenna, support structure, accessory buildings, and parking, and may include other uses associated with and ancillary to personal wireless services.

(13) "City property" means all real property owned by the city whether in fee ownership or other interest.

(14) "City" means the city of Des Moines.

(15) "Co-location" or "collocation" means the use of a personal wireless service facility or cell site by more than one personal wireless service provider or the siting of a facility on an existing structure.

(16) "Collocation permit" means an administrative process exercised and approved by the city manager or designee to encourage collocation of facilities as provided in this ordinance.

(17) "Commercial zones" or "commercial district" means and includes each of the following zoning classifications as defined in DMMC 18.06.020: B-N, Neighborhood Business; B-C, Community Business; C-C, Community Commercial; D-C, Downtown Commercial; C-G, General Commercial; B-P, Business Park; and H-C, Highway Commercial.

(18) "Conditional use permit" or "CUP" means a process and approval as described in city of Des

Moines Ordinance No. 770 and in the Zoning Code, chapter 18.94.

(19) "COW" means "cell on wheels".

(20) "Data communication" means (1) the transmission of encoded information or (2) the transmission of data from one point to another.

(21) "Design" means the appearance of personal wireless service facilities, including such features as their materials, colors, and shape.

(22) "EIA" means the Electronics Industry Association.

(23) "Emergency" means a condition of imminent danger to the health, safety, and welfare of property or persons located within the city including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots or wars.

(24) "Equipment enclosure" means a structure, shelter, cabinet, or vault used to house and protect the electronic equipment necessary for processing wireless communication signals. Associated equipment may include air conditioning, backup power supplies and emergency generators.

(25) "Excess capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the right-of- way that is or will be available for use for additional telecommunications facilities.

(26) "FAA" means the Federal Aviation Administration.

(27) "FCC" or "Federal Communications Commission" means the Federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

(28) "Fiber optics" means the technology of guiding and projecting light for use as a permanent communications medium.

(29) "Franchise" means the initial authorization, or renewal thereof, approved by an ordinance of the city, which authorizes the franchisee to construct, install, operate, or maintain telecommunications facilities in, under, over, or across public ways of the city and to also provide telecommunications service to persons or areas in the city.

(30) "Franchisee" means the person, firm or corporation to whom or which a franchise is granted, as defined in this section, is granted by the council under this ordinance and the lawful successor, transferee or assignee of said person, firm or corporation subject to such conditions as may be defined in this ordinance.

(31) "Governing authority" means the city council of the city of Des Moines.

(32) "Grantee" means both licensees and franchisees granted certain rights and obligations as more fully described herein.

(33) "Hearing examiner" means the duly appointed hearing examiner of the city.

(34) "Modification" means the changing of any portion of a personal wireless service facility from its description in a previously approved permit. Examples include, but are not limited to, changes in design.

(35) "Mount" means the structure or surface upon which personal wireless service facilities are mounted. There are three types of mounts: (i) Building mounted, a personal wireless service facility mount fixed to the roof or side of a building; (ii) ground mounted, a personal wireless service facility mount fixed to the ground, such as a tower; and, (iii) structure mounted, a personal wireless service facility fixed to a structure other than a building, such as light standards, utility poles, and bridges.

(36) "Operator" means the telecommunication carrier firm or corporation to whom a franchise is granted pursuant to the provisions of this ordinance.

(37) "Overhead facilities" means utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

(38) "Person" means corporations, companies, associations, joint stock companies, firms, partnerships, limited liability companies, other entities and individuals.

(39) "Personal wireless service," "personal communications system," "personal wireless service facilities," and "facilities" used in this ordinance, shall be defined in the same manner as in chapter 47, United States

Code, section 332(c)(7)(C), as they may be amended now or in the future and includes facilities for the transmission and reception of radio or microwave signals used for communication, cellular phone, personal communications services, enhanced specialized mobile radio, and any other wireless services licensed by the FCC and unlicensed wireless services.

(40) "Provider" means every corporation, company, association, joint stock company, firm, partnership, limited liability company, other entity and individual which provides personal wireless service over personal wireless service facilities.

(41) "Public ways or rights-of way" includes the surface of and space above and below any real property in city in which city has a regulatory interest, or interest as a trustee for the public including, but not limited to, all public streets, highways, roads, alleys, sidewalks, tunnels, viaducts, bridges, skyways, or any other public place, area or property under the control of the city, and any public or utility easements established, dedicated or devoted for public utility purposes.

(42) "Residential zone" or "residential district" means and includes each of the following zoning classifications as defined in DMMC 18.06.020: RS-15,000, 9,600, 8,400 and 7,200; RA-3,600; RM 2,400; RM-1,800; RM-900; RM-900A; RM-900B; S-E; and S-R.

(43) "Secondary use" means a use subordinate to the principle use of the property, such as commercial, residential, utilities, etc.

(44) "Security barrier" means a wall, fence, or berm that has the purpose of sealing a personal wireless service facility from unauthorized entry or trespass.

(45) "State" means the state of Washington.

(46) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Washington Utilities and Transportation Commission, to allow its use by a telecommunications carrier for a pole attachment.

(47) "Telecommunications carrier" includes every person that directly or indirectly owns, controls, operates or manages plant, equipment or property within the city, used or to be used for the purpose of offering telecommunications service.

(48) "Telecommunications facilities" means the plant, equipment and property within city used to transmit, receive, distribute, provide or offer telecommunications service.

(49) "Telecommunications provider" includes every person who provides telecommunications service over telecommunications facilities.

(50) "Telecommunications service" means the providing or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of voice, data, image, graphic and video programming information between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities, with or without benefit of any closed transmission medium.

(51) "Tower" means any structure that is designed and constructed primarily for the purpose of supporting one or more antennas, including self-supporting lattice towers, guy towers, or monopole towers. The term encompasses personal wireless service facilities including radio and television transmission towers, microwave towers, common-carrier towers, cellular telephone towers or personal communications services towers, alternative tower structures, and the like.

(52) "Underground facilities" means utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for overhead facilities.

(53) "Unlicensed wireless services" means commercial mobile services that operate on public frequencies and do not need a FCC license.

(54) "Usable space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the Washington Utilities and Transportation Commission.

(55) "Utility facilities means the plant, equipment and property including, but not limited to, the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within public ways and used or to be used for the purpose of providing utility or telecommunications services.

(56) "Washington Utilities and Transportation Commission" or "WUTC" means the state administrative

agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers in the state of Washington to the extent prescribed by law.

Additional terms and phrases are likely to be relevant to telecommunications facilities and services subject to regulation by the city. When possible, the city shall turn to existing FCC regulations and/or existing federal statutes for clarification purposes.

Sec. 4. Registration and fees. Except as otherwise provided herein, all telecommunications carriers or providers engaged in the business of transmitting, supplying or furnishing of telecommunications service originating, terminating or existing within the city shall register with the city pursuant to this ordinance and pay all the fees as provided herein.

Sec. 5. License and fees. Except as otherwise provided herein, any telecommunications carrier who desires to construct, install, operate, maintain or otherwise locate telecommunications facilities in public ways for the purpose of providing telecommunications service to persons and areas outside the city shall first obtain a license granting the use of such public ways from the city pursuant to this ordinance and pay all the fees as provided herein.

Sec. 6. Franchise and fees. Except as otherwise provided herein, any telecommunications carrier who desires to construct, install, operate, maintain or otherwise locate telecommunications facilities in public ways and to also provide telecommunications service to persons or areas in the city, shall first obtain a franchise granting the use of such from the city pursuant to this ordinance and pay all the fees as provided herein.

Sec. 7. Cable franchise and fees. Except as otherwise provided herein, any telecommunications carrier who desires to construct, install, operate, maintain or locate tele-communications facilities in public ways for the purpose of providing cable services shall first obtain a cable franchise from the city pursuant to DMMC 5.52 (Cable Communications and Distribution System Franchise Requirements) and pay all the fees as provided in such cable franchise.

Sec. 8. Application to existing franchise agreements. Except as provided in chapter 20.07, this ordinance shall have no effect on any existing franchise agreement until:

(1) The expiration of said franchise agreement; or

(2) An amendment to an unexpired franchise agreement, unless both parties agree to defer full compliance to a specific date not later than the present expiration date.

Sec. 9. Penalties.

(1) A violation or failure to comply with this ordinance is a Class I civil infraction.

(2) In addition to the city's civil enforcement powers, any person found violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this ordinance shall be guilty of a misdemeanor. Upon conviction any person violating any provision of this ordinance shall be subject to a fine of up to one thousand

dollars ($1,000) or by imprisonment for a period of up to ninety (90) days, or by both such fine and imprisonment.

(3) Any person found to have committed a willful, intentional, or bad faith violation of any provision of this ordinance shall be guilty of a gross misdemeanor, and, upon conviction, shall be subject to a fine of up to five thousand ($5,000.00) or by imprisonment for a period of up to one year, or by both such fine and imprisonment.

(4) A separate and distinct violation shall be deemed committed each day on which a violation occurs or continues.

(5) Nothing in this ordinance shall be construed as limiting any remedies that the city may have, at law or in equity, for enforcement of this ordinance.

Sec. 10. Most favored community. In the event that a grantee, franchisee, or lessee enters into any agreement, franchise or other understanding with any other city, town or county in the State of Washington under facts and circumstances that are substantially similar to those found in the city of Des Moines, and which provides terms or conditions more favorable to the city, town or county than those provided in its agreement with the city of Des Moines, such as, but not limited to, free or reduced fee hookups, access or service, the city shall be entitled to request at the city's option, and the grantee, franchisee, or lessee in question shall be required to execute, an amendment to its agreement which incorporates the more favorable terms and conditions.

Sec. 11. Further rules and regulations. The city manager or designee is authorized to establish

further rules, regulations and procedures to implement, administer and enforce this ordinance.

Chapter 20.02 - Registration

Sec. 12. Registration required. All telecommunications carriers having telecommunications facilities within the corporate limits of the city, or all telecommunications carriers or providers that offer or provide telecommunications service within the city, shall register with the city hereunder on forms provided by the city manager or designee which shall include the following:

(1) The identity and legal status of the registrant, including any affiliates.

(2) The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.

(3) A description of registrant's existing or proposed telecommunications facilities within the city.

(4) A description of the telecommunications service that the registrant intends to offer or provide, or is currently offering or providing, to persons, firms, businesses or institutions within the city.

(5) Information sufficient for the city to determine whether the registrant is subject to public way permitting or franchising under this ordinance.

(6) Information sufficient for the city to determine whether the transmission, origination or receipt of the telecommunications services provided or to be provided by the registrant constitutes an occupation or

privilege subject to any municipal tax, or permit, license or franchise fee.

(7) Copies of the applicant's registration filed with the Washington Utilities and Transportation Commission pursuant to WAC 480-121, and any tariff or price list or other authorization or related filings as may be required by the WUTC to provide telecommunications services. Alternatively, applicant shall submit a statement detailing the reasons that registration and related filings with the WUTC are not required.

(8) Information sufficient for the city to determine that the applicant has applied for and received any permit, operating license or other right or approvals required by the Federal Communications Commission to provide telecommunications services or facilities.

(9) Such other information as the city may require.

Sec. 13. Business registration fee. Each initial and subsequent annual application for a telecommunications business registration shall be accompanied by a nonrefundable application fee of $100.00 for the purpose of reimbursing the city for administrative expenses associated with processing the application. The fee shall be subject to modification by the city manager as provided in section 120 of this ordinance.

Sec. 14. Purpose of registration. The purpose of registration is to:

(1) Provide the city with accurate and current information concerning the telecommunications carriers and providers who offer or provide telecommunications

services within the city, or that own or operate telecommunication facilities within the city;

(2) Assist the city in enforcement of this ordinance;

(3) Assist the city in the collection and enforcement of any municipal taxes, franchise fees, license fees or charges that may be due the city; and

(4) Assist the city in monitoring compliance with local, state and federal laws.

Sec. 15. Exception to registration. A person which provides telecommunications services solely to itself, its affiliates or members between points in the same building, or between closely located buildings under common ownership or control, provided that such company or person does not use or occupy any public way of the city or other ways within the city is excepted from the registration requirement pursuant to this ordinance.

Chapter 20.03 - License

Sec. 16. License. A license shall be required of any telecommunications carrier who desires to occupy any public way with any telecommunications facilities for the purpose of providing telecommunications services to persons or areas outside the city.

Sec. 17. License application. Any person that desires a license hereunder shall file an application provided by the city manager or designee.

Sec. 18. Determination by the city. Within 120 days after receiving a complete application

hereunder, the city manager or designee shall make a determination on behalf of the city granting or denying the application in whole or in part. If the application is denied, the determination shall include the reasons for denial. The following standards shall apply when determining to grant or deny the application:

(1) The financial and technical ability of the applicant.

(2) The legal ability of the applicant.

(3) The capacity of the public way to accommodate the applicant's facilities.

(4) The capacity of the public way to accommodate additional utility and telecommunications facilities if the application is granted.

(5) The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the application is granted. Giving consideration to an applicant's willingness and ability to mitigate and/or repair same.

(6) The public interest in minimizing the cost and disruption of construction within the rights-of-way.

(7) The service that applicant will provide to the region.

(8) The effect, if any, on general public health, safety and welfare in the city's sole opinion if the application is granted.

(9) The availability of alternate routes or locations for the proposed facilities.

(10) Applicable federal, state and local laws, regulations, rules and policies.

(11) Such other factors as may demonstrate that the grant to use the public ways will serve the community interest.

Sec. 19. Agreement. No license granted hereunder shall be effective until the applicant and the city have executed a written agreement setting forth the particular items and provisions under which the license to occupy and use public ways will be granted and said agreement is properly recorded pursuant to Washington law. All licenses granted pursuant to this ordinance shall contain substantially similar terms which, taken as a whole and considering relevant characteristics of applicants, do not provide more or less favorable terms and conditions than those required of other licensees or public way permit holders.

Sec. 20. Nonexclusive grant. No license granted hereunder shall confer any exclusive right, privilege or license to occupy or use the public way for delivery of telecommunications services or any other purposes.

Sec. 21. Rights granted.

(1) No license granted hereunder shall convey any right, claim or interest in public ways but shall be deemed a license only to use and occupy the public way for the limited purposes and term stated in the grant.

(2) No license granted hereunder shall authorize or excuse a licensee from securing such further easements, leases, permits or other approvals as may be required to lawfully occupy and use public ways .

(3) No license granted hereunder shall be construed as any warranty of title.

Sec. 22. Term of grant. Unless otherwise specified in a license agreement, a license granted hereunder shall be in effect for a term of not more than five (5) years.

Sec. 23. License route. A license granted hereunder shall be limited to a grant of specific public ways and defined portions thereof, as may be indicated in the license agreement.

Sec. 24. Construction permits. All licensees are required to obtain construction permits, such as those required by Title 14 DMMC, and pay all fees as required by the city, provided, however, that nothing in this ordinance shall prohibit the city and a licensee from agreeing to alternative plan review, permit and construction procedures in a license agreement, provided such alternative procedures provide substantially equivalent safeguards for reasonable construction practices.

Sec. 25. Compensation to city. Each license granted hereunder is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for use of property pursuant, including but not limited to fair and proportionate compensation for any increased deterioration or decrease in the useful life of any city public way or property used pursuant to the license and reimbursement

for the city's costs in connection with reviewing, inspecting and supervising the use and occupancy of the telecommunication structure on behalf of the public and existing or future users, provided nothing in this ordinance shall prohibit the city and a licensee from agreeing upon the compensation to be paid.

All grantees shall, within thirty (30) days after written demand, reimburse the city for all direct and indirect costs and expenses incurred by the city in connection with any modification, amendment, renewal or transfer of the authorization or any authorization agreement. In addition, all grantees shall, within thirty (30) days after written demand, reimburse the city for any and all costs the city reasonably incurs in response to any emergency involving the grantee's telecommunications facilities. All grantees shall, within thirty (30) days after written demand, reimburse this city for the grantee's proportionate share of all actual, identified expenses incurred by the city in planning, constructing, installing, repairing or altering any city facility as a result of the construction or the presence in the public ways of the grantee's telecommunications facilities.

Sec. 26. Service to city users. A licensee may be permitted to offer or provide telecommunications services to persons or areas within the city upon receiving a franchise pursuant to this ordinance.

Sec. 27. Amendment of grant.

(1) A new license application and grant shall be required of any telecommunications carrier that desires to extend or locate its telecommunications facilities in public ways which are not included in a license previously granted hereunder.

(2) If ordered by the city to locate or relocate its telecommunications facilities in public ways not included in a previously granted license, the city shall grant a license amendment without further application.

(3) A new license application and grant shall be required of any telecommunications provider that desires to add to or modify the telecommunications services provided pursuant to a license previously granted.

Sec. 28. Renewal applications. A licensee that desires to renew its license hereunder shall, not more than 180 days nor less than 90 days before expiration of the current license, file an application with the city for renewal of its license which shall include the following information:

(1) The applicable information required pursuant to the license application.

(2) Any other information required by city.

Sec. 29. Renewal determinations. Within ninety (90) days after receiving a complete application hereunder, the city manager or designee shall make a determination on behalf of the city granting or denying the renewal application in whole or in part. If the renewal application is denied, the determination shall include the reasons for non-renewal. The standards enumerated in section 33 shall apply when determining to grant or deny the application, plus a determination of the applicant's compliance with the requirements of this ordinance and the license agreement.

Sec. 30. Obligation to cure as a condition of renewal. No license shall be renewed until any ongoing

violations or defaults in the licensee's performance of the license agreement, of the requirements of this ordinance, and all applicable laws, statutes, codes, ordinances, rules and regulations have been cured, or a plan detailing the corrective action to be taken by the licensee has been approved by the city manager or designee.

Chapter 20.04 - Franchise

Sec. 31. Franchise. A franchise shall be required of any telecommunications carrier who desires to occupy public ways and to provide Telecommunications services to any person or area in the city.

Sec. 32. Franchise application. Any person that desires a franchise hereunder shall file an application provided by the city manager or designee.

Sec. 33. Determination by the city. Within 120 days after receiving a complete application hereunder, the city manager shall make a recommendation to the city council to grant or deny the application in whole or in part. The city council will consider the franchise following receipt of the city manager's recommendation. If the application is denied, the determination shall include the reasons for denial. The standards enumerated in section 18 of this ordinance shall apply when determining to grant or deny the application.

Sec. 34. Agreement. No franchise shall be granted hereunder unless the applicant and the city have executed a written agreement setting forth the particular terms and provisions under which the franchise to occupy and use public ways will be granted and said agreement has been recorded pursuant to Washington law. All franchises granted pursuant to this ordinance shall contain

substantially similar terms and conditions which, taken as a whole and considering relevant characteristics of the applicants, do not provide more or less favorable terms and conditions than those required of other franchisees.

Sec. 35. Nonexclusive grant. No franchise granted hereunder shall confer any exclusive right, privilege or franchise to occupy or use the public ways for delivery of Telecommunications services or any other purposes.

Sec. 36. Rights granted.

(1) No franchise granted hereunder shall convey any right, title or interest in the public ways but shall be deemed a franchise only to use and occupy the public ways for the limited purposes and term stated in the grant.

(2) No franchise granted hereunder shall authorize or excuse a franchisee from securing such further easements, leases, permits or other approvals as may be required by private parties or other governmental entities to lawfully occupy and use public ways.

(3) No franchise granted hereunder shall be construed as any warranty of title.

Sec. 37. Term of grant. Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be valid for a term of not more than ten (10) years.

Sec. 38. Franchise territory. A telecommunications franchise granted hereunder shall be limited to the specific geographic area of the city to be

served by the franchisee, and the specific public ways and portions thereof, as may be identified in the franchise agreement.

Sec. 39. Construction permits. All franchisees are required to obtain permits and pay all fees for telecommunications facilities as required by Title 14 DMMC, provided, however, that nothing in this ordinance shall prohibit the city and a franchisee from agreeing to alternative plan review, permit and construction procedures in a franchise agreement, provided such alternative procedures provide substantially equivalent safeguards for responsible construction practices.

Sec. 40. Compensation to city. Each franchise granted hereunder is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for use of property pursuant to a franchise, provided nothing in this ordinance shall prohibit the city and a franchisee from agreeing upon the compensation to be paid.

Sec. 41. Nondiscrimination. A franchisee shall make its telecommunications services available to any customer within its franchise area who shall request such service, without discrimination as to the terms, conditions, rates or charges for franchisee's services, provided, however, that nothing in this ordinance shall prohibit a franchisee from making any reasonable and lawful classifications among differently situated customers, including classifications based on credit or payment history.

Sec. 42. Service to the city. A franchisee shall make its telecommunications services available to the city at its most favorable rate for similarly situated users,

provided, however, the city may negotiate more favorable rates or free service in lieu of other obligations of franchisee.

Sec. 43. Amendment of grant.

(1) A new franchise application and grant shall be required of any telecommunications carrier that desires to extend its franchise territory or to locate its telecommunications facilities in public ways which are not included in a franchise previously granted hereunder.

(2) If ordered by the city to locate or relocate its telecommunications facilities in public ways not included in a previously granted franchise, the city shall grant a franchise amendment without further application.

(3) A franchise application and grant shall be required of any telecommunications provider that desires to add to or modify the telecommunications services provided pursuant to a franchise previously granted.

Sec. 44. Renewal applications. A franchisee that desires to renew its franchise hereunder shall, not more than one hundred eighty (180) days nor less than ninety (90) days before expiration of the current franchise, file an application with the city for renewal of its franchise which shall include the following information:

(1) The applicable information required pursuant to the franchise application.

(2) Any other information required by the city.

Sec. 45. Renewal determinations. Within sixty (60) days after receiving a complete application hereunder, the city manager or designee shall make a recommendation to the city council to grant or deny the renewal application in whole or in part. If the renewal application is denied by the city council, the determination shall include the reasons for non-renewal. The standards enumerated in section 18 of this ordinance shall apply when determining to grant or deny the application, plus a determination of the applicant's compliance with the requirements of this ordinance and the franchise agreement.

Sec. 46. Obligation to cure as a condition of renewal. No franchise shall be renewed until any ongoing violations or defaults in the franchisee's obligations under the franchise agreement, of the requirements of this ordinance, and all applicable laws, statutes, codes, ordinances, rules and regulations have been cured, or a plan detailing the corrective action to be taken by the franchisee has been approved by the city.

Chapter 20.05 - Cable Franchise

[Reserved for possible renumbering of existing DMMC 5.52 re: Cable Franchises]

Chapter 20.06 - Conditions of Grant of License, Franchise or Cable Franchise

Sec. 47. General duties.

(1) All grantees, before commencing any construction in public ways shall comply with all requirements of the Des Moines Municipal Code or other ordinances of the city.

(2) All grantees shall provide written confirmation sufficient for customary land survey and land title insurance purposes concerning the location of its facilities in public ways and disclaiming any interest in public ways where it has no license or franchise to construct or operate its facilities.

Sec. 48. Interference with the public ways. No grantee may locate or maintain its telecommunications facilities so as to unreasonably interfere with the use of the public ways by the city, by the general public or other persons authorized to use or be present in or upon the public ways. All such facilities shall be moved by and at the expense of the grantee, temporarily or permanently, as determined by the city.

Sec. 49. Damage to property. No grantee or any person acting on a grantee's behalf shall take any action or permit any action to be done which may impair or damage any public ways, or other property located in, on or adjacent thereto except in accordance with section 58.

Sec. 50. Notice of work. Unless otherwise provided in a license or franchise agreement, no grantee, or any person acting on the grantee's behalf, shall commence any non-emergency work involving undergrounding, excavation or obstructing in or about the public ways without five (5) working days advance written notice to the city. Any private property owner whose property will be affected by a grantee's work shall be afforded the same notice.

Sec. 51. Repair and emergency work. In the event of an unexpected repair or emergency, a grantee may commence such repair and emergency response work

as required under the circumstances, provided the grantee shall notify the city manager as promptly as possible, before such repair or emergency work or as soon thereafter as possible if advance notice is not practicable.

Sec. 52. Maintenance of facilities. Each grantee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements.

Sec. 53. Relocation or removal of facilities. Within thirty (30) days following written notice from the city, a grantee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any telecommunications facilities within the public ways whenever the city manager or designee shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

(1) The construction, repair, maintenance or installation of any city or other public improvement in or upon the public ways.

(2) The operations of the city or other governmental entity in or upon the public ways.

(3) The vacation of a public street or the release of a utility easement.

Sec. 54. Removal of unauthorized facilities. Within thirty (30) days following written notice from the city, any grantee, telecommunications carrier, or other person that owns, controls or maintains any unauthorized telecommunications system, facility or related appurtenances within the public ways shall, at its own expense, remove such facilities or appurtenances from the

public ways. If such grantee fails to remove such facilities or appurtenances, the city may cause the removal and charge the grantee for the costs incurred. A telecommunications system or facility is unauthorized and subject to removal in the following circumstances:

(1) Upon expiration or termination of the grantee's license or franchise.

(2) Upon abandonment of a facility within the public ways.

(3) If the system or facility was constructed or installed without the prior grant of a license or franchise.

(4) If the system or facility was constructed or installed without the prior issuance of a required construction permit.

(5) If the system or facility was constructed or installed at a location not permitted by the grantee's license or franchise. Provided, however, that the city may, in its sole discretion, allow a grantee, franchisee, or other such persons who may own, control, or maintain cable or telecommunications facilities within the public ways of the city to abandon such facilities in place. No facilities of any type may be abandoned in place without the express written consent of the city. Any plan for abandonment or removal of a grantee or franchisee's facilities must be first approved by the public works director, and all necessary permits must be obtained prior to such work. Upon permanent abandonment of the property of such persons in place, the property shall become that of the city, and such persons shall submit to the city an instrument in writing, to be approved by the city attorney, transferring to the city the ownership of such property. The provisions of this section

shall survive the expiration, revocation, or termination of an authorization or franchise granted under this ordinance.

(6) Any such other reasonable circumstances affecting public health, safety and welfare deemed necessary by the city manager or designee.

Sec. 55. Failure to relocate. If a grantee is required to relocate, change or alter the telecommunications facilities hereunder and fails to do so, the city may cause such to occur and charge the grantee for the costs incurred.

Sec. 56. Emergency removal or relocation of facilities. The city retains the right and privilege to cut or move any telecommunications facilities located within the public ways as the city may determine to be necessary, appropriate or useful in response to any public health or safety emergency. The city shall not be liable to any cable operator, telecommunications carrier or provider, or any other party for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the city's actions under this section.

Sec. 57. Damage to grantee's facilities. Unless directly and proximately caused by the willful, intentional or malicious acts of the city, the city shall not be liable for any damage to or loss of any telecommunications facility within the public ways as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the public ways by or on behalf of the city.

Sec. 58. Restoration of public ways. Restoration shall comply with the following:

(1) When a grantee, or any person acting on its behalf, does any work in or affecting any public way, it shall, at its own expense, promptly remove any obstructions therefrom and restore such ways or property to the same condition which existed before the work was undertaken. As used in this section, "promptly" shall mean as required by the city's public works director in the reasonable exercise of the director's discretion.

(2) If weather or other conditions do not permit the complete restoration required hereunder, the grantee shall temporarily restore the affected ways or property. Such temporary restoration shall be at the grantee's sole expense and the grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

(3) A grantee or other person acting on its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such public way.

(4) The public works director shall be responsible for inspection and final approval of the condition of the public ways following any construction and restoration activities therein. Further, the provisions of this section shall survive the expiration, revocation, or termination of an authorization, franchise, lease, or other agreement granted pursuant to this ordinance.

Sec. 59. Facilities maps. Each grantee shall provide the city with an accurate as-built map or

maps certifying the location of all telecommunications facilities within public ways. Each grantee shall provide updated as-built maps annually or upon request of the city.

Sec. 60. Duty to provide information. Within ten (10) days of a written request from the city manager or designee, each grantee shall furnish the city manager or designee with information sufficient to demonstrate:

(1) That grantee has complied with all requirements of this ordinance.

(2) That all taxes and fees due the city in connection with the telecommunications services and facilities provided by the grantee have been properly collected and paid by the grantee.

(3) That all books, records, maps and other documents maintained by the grantee with respect to its facilities within the public ways shall be made available for inspection by the city manager or designee at reasonable times and intervals.

Sec. 61. Leased capacity. Subject to the provisions of section 69 of this ordinance, a grantee shall have the right to offer or provide capacity or bandwidth to another telecommunications provider, with prior city approval, provided that:

(1) Grantee shall furnish the city in advance with a copy of any such proposed lease or agreement.

(2) The proposed lessee or person shall comply with all of the requirements of this ordinance.

Sec. 62. Grantee insurance. Unless otherwise provided by franchise or license, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the city, and its elected and appointed officers, officials, agents, representatives and employees as additional insureds:

(1) Comprehensive general liability insurance with limits not less than:

(a) Five Million Dollars ($5,000,000) for bodily injury or death to each person;

(b) Five Million Dollars ($5,000,000) for property damage resulting from any one accident; and

(c) Five Million Dollars ($5,000,000) for all other types of liability.

(2) Automobile liability for owned, non-owned and hired vehicles with a limit of Three Million Dollars ($3,000,000) for each person and Three Million Dollars ($3,000,000) for each accident.

(3) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars ($1,000,000).

(4) Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than Three Million Dollars ($3,000,000).

(5) The liability insurance policies required by this section shall be maintained at all times by the

grantee. Each such insurance policy shall contain the following endorsement:

> "It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until sixty (60) days after receipt by the city, by registered mail, of a written notice addressed to the city manager of such intent to cancel or not to renew."

(6) Within thirty (30) days after receipt by the city of said notice, and in no event later than fifteen (15) days prior to said cancellation, the grantee shall obtain and furnish to the city replacement insurance policies meeting the requirements of this ordinance.

Sec. 63. General indemnification. In addition to and distinct from the insurance requirements of this ordinance, each grantee hereby agrees to defend, indemnify and hold the city and its officers, officials, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the acts, omissions, failure to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its tele-communications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed or prohibited by this ordinance or by a grant agreement made or entered into pursuant to this ordinance.

Sec. 64. Performance and financial guarantees. Before a license or franchise granted pursuant to this ordinance is effective, and as necessary thereafter, the grantee shall provide and deposit such monies, bonds, letters of credit or other instruments in form and substance acceptable to the city as may be required by this ordinance, or by an applicable license or franchise agreement or other applicable code, ordinance or rules and regulations of the city.

Sec. 65. Security fund. Each grantee shall establish a permanent security fund with the city by depositing the amount of up to $50,000 with the city in cash, an unconditional letter of credit, or other instrument acceptable to the city, which fund shall be maintained at the sole expense of grantee so long as any of grantee's telecommunications facilities are located within the public ways. This security fund shall be separate and distinct from any other bond or deposit required.

(1) The fund shall serve as security for the full and complete performance of grantee's obligations under this ordinance, including any costs, expenses, damages or loss the city pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the city.

(2) Before any sums are withdrawn from the security fund, the city manager or designee shall give written notice to the grantee:

(a) Describing the act, default or failure to be remedied, or the damages, cost or expenses which the city has incurred by reason of the grantee's act or default;

(b) Providing a reasonable opportunity for the grantee to first remedy the existing or ongoing default or failure, if applicable;

(c) Providing a reasonable opportunity for the grantee to pay any monies due the city before the city withdraws the amount thereof from the security fund, if applicable;

(d) That the grantee will be given an opportunity to review the act, default or failure described in the notice with the city manager or designee.

(3) Grantee shall replenish the security fund within fourteen (14) days after written notice from the city manager or designee that there is a deficiency in the amount of the fund.

Sec. 66. Construction and completion bond. Unless otherwise provided in a license or franchise agreement, a bond written by a surety acceptable to the city equal to at least 100% of the estimated cost of constructing the grantee's telecommunications facilities within the public ways shall be deposited before a construction permit is issued.

(1) The construction bond shall remain in force until sixty (60) days after substantial completion of the work, as determined by the city manager or designee, including restoration of public ways and other property affected by the construction.

(2) The construction bond shall guarantee, to the satisfaction of the city:

(a) Timely completion of construction;

(b) Construction in compliance with applicable plans, permits, technical codes and standards;

(c) Proper location of the facilities as specified by the city;

(d) Restoration of the public ways and other property affected by the construction;

(e) The submission of "as-built" drawings after completion of the work as required by this ordinance;

(f) Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.

Sec. 67. Acts at grantee's expense. Any act that a grantee is or may be required to perform under this ordinance, a license, franchise, or cable franchise or applicable law shall be performed at the grantee's expense.

Sec. 68. Coordination of construction activities. All grantees are required to cooperate with the city and with each other as follows:

(1) By February 1 of each year, grantee shall provide the city manager or designee with a non-binding schedule of their proposed construction activities which may affect the public ways for that year. Grantees shall promptly file modified schedules with the city as their construction plans change.

(2) Each grantee shall meet with the city, other grantees and users of the public ways annually or as

determined by the city to schedule and coordinate construction.

(3) All construction locations, activities and schedules shall be coordinated, as ordered by the city manager or designee, to minimize public inconvenience, disruption or damages.

Sec. 69. Assignments or transfers of grant. Ownership or control of a telecommunications system, license or franchise or any part of transmission capacity may not directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, nor may there be a transfer of working control (which includes not only actual control, but also the ability to affect or influence decisions) without the prior written consent of the city, which consent shall not be unreasonably withheld or delayed, as expressed by ordinance and then on such conditions as may be prescribed therein and:

(1) No grant shall be assigned or transferred in any manner within twelve (12) months after the initial grant of the license or franchise unless otherwise provided by law.

(2) Absent extraordinary and unforeseeable circumstances, no grant, system or integral part of a system shall be assigned or transferred before construction of the telecommunications system has been completed.

(3) The grantee and the proposed assignee or transferee of the grant or system shall provide and certify the following information to the city manager or designee:

(a) Complete information setting forth the nature, terms and condition of the proposed transfer or assignment;

(b) All information required of a license or franchise applicant pursuant to this ordinance with respect to the proposed transferee or assignee;

(c) All information required by federal, state and local law or regulation [i.e., FCC 394's];

(d) Any other information reasonably required by the city manager or designee.

(4) No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other qualifications in city's sole discretion to own, hold and operate the telecommunications system pursuant to this ordinance.

(5) The grantee shall reimburse the city for all direct and indirect fees, costs and expenses incurred by the city in considering a request to transfer ownership in or assign a license or franchise.

(6) Any transfer of ownership in or assignment of a grant, system or integral part of a system without prior approval of the city under this chapter shall be void and is cause for revocation of the grant.

(7) Upon receipt of all information required herein, and any other information required by the city, the city shall have one hundred and twenty (120) days to review and approve or deny the requested assignment or transfer, unless such period is extended by agreement of the city and grantee.

Sec. 70. Transactions affecting control of grant. Any transaction which results in any change of the ownership or in any manner the working control of the grantee, of the ownership or working control of a license or franchise, of the ownership or working control of affiliated entities having ownership or working control of the grantee or of a telecommunications system, or of control of the capacity or bandwidth or any part of the transmission capacity of the grantee's telecommunications system, Facilities or any parts thereof, all defined as 5% or more ownership or control, shall be considered an assignment or transfer requiring city approval hereunder. Transactions between affiliated entities are not exempt from city approval.

Sec. 71. Revocation or termination of grant. A license or franchise granted by the city to use or occupy public ways may be revoked for any one or more of the following reasons:

(1) Construction or operation at an unauthorized location.

(2) Unauthorized transfer of control of the grantee.

(3) Unauthorized assignment of a license or franchise.

(4) Unauthorized sale, assignment or transfer of the grantee's franchise or license assets or an interest therein.

(5) Misrepresentation or lack of candor by or on behalf of a grantee in any application to the city.

(6) Abandonment of telecommunications facilities in public ways.

(7) Failure to relocate or remove facilities as required in this ordinance.

(8) Failure to pay taxes, compensation, fees or costs when and as due the city.

(9) Insolvency or bankruptcy of the grantee.

(10) Violation of a material provision of this ordinance.

(11) Violation of a material term of a license or franchise.

Sec. 72. Notice and duty to cure. In the event that the city manager or designee believes that grounds exist for revocation of a license or franchise, the grantee shall be given written notice of the apparent violation or noncompliance, be provided a short and concise statement of the nature and general facts of the violation or noncompliance, and be given a reasonable period of time not exceeding thirty (30) days to furnish evidence:

(1) That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.

(2) That rebuts the alleged violation or noncompliance.

(3) That it would be in the public interest to impose some monetary damages, penalty or sanction less than revocation.

Sec. 73. Hearing. In the event that a grantee fails to provide evidence reasonably satisfactory to the city manager or designee as provided hereunder, the city manager or designee shall refer the apparent violation or noncompliance to the city's hearing examiner. The city shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

Sec. 74. Standards for revocation or lesser sanctions. If persuaded that the grantee has violated or failed to comply with a material provision of this ordinance or of a franchise or license or applicable codes, ordinance, statutes, or rules and regulations, the hearing examiner shall determine whether to revoke the license or franchise, and issue a written decision relating thereto, or to establish some monetary damages, penalty, lesser sanction and cure, considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

(1) Whether the misconduct was egregious.

(2) Whether substantial harm resulted.

(3) Whether the violation was intentional.

(4) Whether there is a history of prior violations of the same or other requirements.

(5) Whether there is a history of overall compliance.

(6) Whether the violation was voluntarily disclosed, admitted or cured.

Sec. 75. Ownership and removal of improvements. In the event that the city requires removal of such improvements, such removal shall be accomplished at the sole expense of the grantee and completed within 30 days after receiving notice from the city requiring removal of the improvements. In the event that telecommunications facilities or other equipment are left upon city property after expiration or termination of the lease, they shall become the property of the city if not removed by the grantee upon 30 days written notice from the city. No grant shall be issued under this ordinance unless it contains a provision which states that all buildings, landscaping, and all other improvements, except telecommunications equipment, shall become the property of the city upon expiration or termination of the grant.

Sec. 76. Incorporation by reference. The provisions of this ordinance shall be incorporated by reference in any authorization, grant, franchise, or license issued hereunder. The provisions of any proposal submitted and accepted by the city shall be incorporated by reference in the applicable authorization, grant, franchise, or license. However, in the event of any conflict between the proposal, this ordinance, and the authorization, grant, franchise, or license, the authorization, grant, franchise, or license shall be the prevailing document.

Chapter 20.07 - Antennas and Wireless Telecommunication Facilities

Sec. 77. Purpose.

(1) These standards set forth in this section are designed to protect the public health, safety, and welfare, to protect property values and minimize visual impact while furthering the development of enhanced telecommunication services in the city and these standards were designed to comply with the Telecommunications Act of 1996. The provisions of this ordinance are not intended to and shall not be interpreted to prohibit or to have the effect of prohibiting personal wireless services. This ordinance shall not be applied in such a manner as to unreasonably discriminate between providers of functionally equivalent personal wireless services.

(2) To the extent that any provision of this ordinance is inconsistent or conflicts with any other city ordinance this ordinance shall control. Otherwise, this ordinance shall be construed consistently with the other provisions and regulations of the city.

(3) In reviewing any application to provide personal wireless service or to install personal wireless service facilities, the city shall act within a reasonable period of time, taking into account the nature and scope of the application. Any decision to deny an application shall be in writing, supported by substantial evidence contained in a written record. The city shall approve, approve with condition, or deny the application in accordance with the time frames and exceptions set forth in this ordinance, Ordinance No. 1174 and in accordance with other applicable ordinances.

Sec. 78. Exemptions. The following are exempt from the provisions of this ordinance and shall be permitted in all zones:

(1) Industrial processing equipment and scientific or medical equipment using frequencies regulated by the FCC.

(2) Antennas and related equipment no more than three feet in height that are being stored, shipped, or displayed for sale.

(3) Radar systems for military and civilian communication and navigation.

(4) Wireless radio utilized for temporary emergency communications in the event of a disaster.

(5) Licensed amateur (ham) radio stations.

(6) Satellite dish antennas less than two meters in diameter, including direct to home satellite services, when used as a secondary use of the property.

(7) Routine maintenance or repair of a personal wireless service facility and related equipment, (excluding structural work or changes in height or dimensions of antennas, towers, or buildings) provided that compliance with the standards of this ordinance are maintained

(8) Subject to compliance with all other applicable standards of this ordinance, a building permit application need not be filed for emergency repair or maintenance of a personal wireless service facility until

thirty (30) days after the completion of such emergency activity.

(9) A cell on wheels or other temporary personal wireless telecommunications facility shall be permitted at a time and manner as determined by the city.

Sec. 79. Recognition of industry site selection criteria. In establishing a new site, the industry requires a location that is technically compatible with the established network. A general area is to be identified based upon engineering constraints and the desired area of service. Specific locations within that general area will be evaluated using the following criteria which are not listed in order of priority:

(1) Topography as it relates to line of sight transmissions for optimum efficiency in telephone service.

(2) Availability of road access.

(3) Availability of electric power.

(4) Availability of land based telephone lines or microwave link capability.

(5) Lands leasable at fair market value, and landlords who want facilities to be located on their properties consistent with zoning regulations.

(6) Screening potential of existing vegetation, structures and topographic features.

(7) Zoning that will allow low power mobile radio service facilities.

(8) Compatibility with adjacent land uses.

(9) The least number of sites to cover the desired area.

(10) The greatest amount of coverage, consistent with physical requirements.

(11) Opportunities to mitigate possible visual impact.

(12) Availability of suitable existing structures for antenna mounting.

Sec. 80. Site selection criteria.

(1) Any applicant proposing to construct an antenna support structure, or mount an antenna on an existing structure, shall demonstrate by engineering evidence that the antenna must be located at the site to satisfy its function in the applicant's local grid system. Further, the applicant must demonstrate by engineering evidence that the height requested is the minimum height necessary to fulfill the site's function within the grid system.

(2) Applications for necessary permits will only be processed when the applicant demonstrates either that it is an FCC-licensed telecommunications provider or that it has agreements with an FCC-licensed telecommunications provider for use or lease of the support structure.

(3) Low power mobile radio service facilities shall be located and designed to minimize and mitigate any significant adverse impact on residential property values.

Facilities shall be placed in locations where the existing topography, vegetation, buildings, or other structures provide the greatest amount of screening.

(4) In all zones, location and design of facilities shall consider the impact of the facility on the surrounding neighborhood and the visual impact within the zone district. In all zones, towers shall be significantly screened or designed according to standards to be established by the community development director.

Sec. 81. Priority of locations. The order of priorities for locating new personal wireless service facilities shall be as follows:

(1) Place antennas and towers on city property if practical.

(2) Place antennas on appropriate public ways and existing structures, such as buildings, towers, water towers and smokestacks.

(3) Place antennas and towers in districts zoned Commercial.

(4) Place antennas and towers on other non-residential property.

(5) Place antennas on multi-family residential structures exceeding thirty feet (30') in height.

(6) Place antennas and towers in Residential zones a) only if appropriate locations are not available in non-residential zones; or b) when co-location on an existing structure can be accomplished in a manner consistent with

the design and aesthetic considerations provided under this ordinance.

Sec. 82. Conditional use permit required for antennas and personal wireless facilities in a residential zone.

(1) Except for items exempt from the provisions of this ordinance as provided in section 78, a conditional use permit is required for all antennas, towers, and personal wireless facilities located in a residential zone. Any terms and conditions imposed on such use shall contain substantially similar terms and conditions which, taken as a whole and considering relevant characteristics of the facility and situation at hand, do not provide more or less favorable terms and conditions than those required of licensees or franchisees under this ordinance.

(2) An applicant that wishes to locate a new antenna support structure in a residential zone shall demonstrate that a diligent effort has been made to locate the proposed communications facilities on a government facility, a private institutional structure, or other appropriate existing structures within a non-residential zone, and that due to valid considerations including physical constraints, and economic or technological feasibility, no appropriate location is available.

(3) Applicants are required to demonstrate: (a) that they have contacted the owners of structures in excess of thirty feet (30′) within a one-quarter (1/4) mile radius of the site proposed and which from a location standpoint could provide part of a network for transmission of signals, and (b) have asked for permission to install the antenna on those structures at fair market value.

(4) The information submitted by the applicant shall include: (a) a map of the area to be served by the tower or antenna, (b) its relationship to other cell sites in the applicant's network, and (c) an evaluation of existing buildings taller than thirty feet (30′), within one-quarter (1/4) mile of the proposed tower or antenna which from a location standpoint could provide part of a network to provide transmission of signals.

Sec. 83. Siting priority on public property. Where public property is sought to be utilized by an applicant, priority for the use of city-owned land for wireless antennas and towers will be given to the following entities in descending order:

(1) City of Des Moines;

(2) Public safety agencies, including law enforcement, fire and ambulance services, which are not part of the city of Des Moines and private entities with a public safety agreement with the city of Des Moines;

(3) Other governmental agencies, for uses which are not related to public safety; and

(4) Entities providing licensed commercial wireless telecommunication services including cellular, personal communication services (PCS), specialized mobilized radio (SMR), enhanced specialized mobilized radio (ESMR), data, Internet, paging, and similar services that are marketed to the general public.

(a) Minimum requirements. The placement of personal wireless service facilities on city-

owned property must comply with the following requirements:

(i) The facilities will not interfere with the purpose for which the city-owned property is intended;

(ii) Probable, significant adverse impacts on surrounding private property can be appropriately mitigated;

(iii)The applicant is willing to obtain adequate liability insurance and commit to a lease agreement which includes equitable compensation for the use of public land and other necessary provisions and safeguards. The city shall establish fees after considering comparable rates in other cities, potential expenses, risks to the city, and other appropriate factors;

(iv)The applicant will submit a letter of credit, performance bond, or other security acceptable to the city to cover the costs of removing the facilities;

(v) The antennas or tower will not interfere with other users who have a higher priority as discussed in section 83;

(vi)The lease shall provide that, the applicant must agree that in the case of a declared emergency or documented threat to public health, safety or welfare and following reasonable notice, the city may require the applicant to remove the facilities at the applicant's expense;

(vii) The applicant must reimburse the city for any related costs which the city incurs because of the presence of the applicant's facilities;

(viii) The applicant must obtain all necessary land use approvals; and

(ix) The applicant must cooperate with the city's objective to encourage co-locations and thus limit the number of cell sites requested, or camouflage the site.

(b) Special requirements for parks.

The use of city-owned parks for personal wireless service facilities brings with it special concerns due to the unique nature of these sites. The placement of personal wireless service facilities in a park will be allowed only when the following additional requirements are met:

(i) The city manager or designee has reviewed and made a recommendation regarding proposed personal wireless service facilities to be located in the park and this recommendation must be forwarded to the city council for consideration;

(ii) In no case shall personal wireless service facilities be allowed in designated critical areas unless they are co-located on existing facilities.

(iii) Before personal wireless service facilities may be located in public parks, consideration shall be given to visual impacts and disruption of normal public use;

(iv) Personal wireless service facilities may be located in public parks that are adjacent to an existing commercial or industrial zone;

(v) Personal wireless service facilities may be located in park maintenance facilities.

(vi) Personal wireless facilities may only be located in public parks if the applicant presents evidence sufficient to satisfy the city manager that such facilities will be appropriately designed, sited, and constructed to protect the health, safety and welfare of park users.

(c) Required submittals. Application for conditional use permits, building permits, and other related requests may include any combination of site plans, surveys, maps, technical reports, or written narratives necessary to convey the following information in addition to the requirements of other applicable ordinances:

(i) Photosimulations of the proposed facility from affected residential properties and public ways at varying distances;

(ii) A site elevation and landscaping plan indicating the specific placement of the facility on the site, the location of existing structures, trees, and other significant site features, the type and location of plant materials used to screen the facility, and the proposed color(s) of the facility;

(iii)A signed statement indicating that (i) the applicant and landowner agree they will diligently negotiate in good faith to facilitate co-location of additional personal wireless service facilities by other

providers on the applicant's structure or within the same site location and (ii) the applicant and/or landlord agree to remove the facility within sixty (60) days after abandonment;

(iv)Copies of any environmental documents required by any federal agency. These shall include the environmental assessment required by FCC Para. 1.1307, or, in the event that an FCC environmental assessment is not required, a statement that describes the specific factors that obviate the requirement for an environmental assessment;

(v) A site plan clearly indicating the location, type and height of the proposed tower and antenna, on-site land uses and zoning, adjacent land uses and zoning, adjacent roadways, proposed means of access, setbacks from property lines, elevation drawings of the proposed tower, and any other proposed structures;

(vi)A current map and aerial showing the location of the proposed tower, a map showing the locations and service areas of other personal wireless service facilities operated by the applicant and those proposed by the applicant that are close enough to impact service within the city;

(vii) Legal description of the parcel, if applicable;

(viii) The approximate distance between the proposed tower and the nearest residential unit, platted residentially zoned properties, and unplatted residentially zoned properties;

(ix) A landscape plan showing specific landscape materials;

(x) Method of fencing, and finished color and, if applicable, the method of camouflage and illumination;

(xi) A letter signed by the applicant stating the tower will comply with all FAA regulations and EIA Standards and all other applicable federal, state and local laws and regulations;

(xii) A statement by the applicant as to whether construction of the tower will accommodate co-location of additional antennas for future users;

(xiii) Certification that the antenna usage will not interfere with other adjacent or neighboring transmission or reception functions;

(xiv) The telecommunications company must demonstrate that it is licensed by the FCC if required to be licensed under FCC regulations;

(xv) The applicant, if not the telecommunications service provider, shall submit proof of lease agreements with an FCC licensed telecommunications provider if such telecommunications provider is required to be licensed by the FCC;

(xvi) A full site plan shall be required for all sites, showing the tower, antenna, antenna support structure, building, fencing, buffering, access, and all other items required in this ordinance. The site plan

shall not be required if the antenna is to be mounted on an existing structure; and

(xvii) At the time of site selection, the applicant should demonstrate how the proposed site fits into its overall network within the city.

Sec. 84. Co-location.

(1) To minimize adverse visual impacts associated with the proliferation of towers, co-location of personal wireless service facilities on existing or new towers is encouraged as follows:

(a) Proposed facilities may, and are encouraged to, co-locate onto existing towers. Such co-location is permitted by right and new or additional conditional use permit approval is not required, except that any other permit, license, lease, or franchise requirements must be satisfied, and the co-location must be accomplished in a manner consistent with the policy, site criteria, and landscape/screening provisions contained in this ordinance.

(b) The conditional use permit requirement for a facility may be waived in all zones if the applicant locates the antenna on an existing structure or an existing tower. The applicant must submit detailed plans to the community development department for a co-location permit to determine if the conditional use permit process and public hearing can be waived. No building permit will be issued until approval is granted by a co-location permit or conditional use permit.

(c) The city may deny an application to construct new facilities if the applicant has not shown by

substantial evidence that it has made a diligent effort to mount the facilities on an existing structure or tower.

(d) To reduce the number of antenna support structures needed in the city in the future, new proposed support structures shall be designed to accommodate antennas for more than one user, unless the applicant demonstrates why such design is not feasible for economic, technical or physical reasons.

(e) Unless co-location is not feasible: (i) an applicant's site plan shall reserve an area for other providers' equipment and/or probable expansion or modification of the applicant's proposed facility near the base of the applicant's tower. A first right-of-refusal (which is either executed or maintained while the providers personal wireless facilities and services are in use) to lease the area at the base of the tower or mount for other providers will meet the reservation requirement. To provide further incentive for co-location, an existing tower may be modified through a collocation permit which may be issued by the city manager or designee when an applicant can demonstrate the ability to collocate an additional antenna of the same type as that on the existing tower and that the height of the existing tower will not be increased.

(f) While co-location and the requirements herein are encouraged, co-location shall not take precedence over the construction of shorter towers with appropriate screening.

(2) Providers with existing facilities capable of accommodating co-location within the city of Des Moines are hereby required to negotiate in good faith with

any applicant seeking to co-locate telecommunications equipment on their facilities.

If an applicant is unable to reach a co-location agreement with a provider owning or controlling an existing facility within the city as the result of terms and conditions which are believed to be in bad faith and anti-competitive, the aggrieved applicant may, upon payment of a filing fee to be established by the city manager, petition the community development director to make a determination as to whether such terms and conditions should be deemed in bad faith and anti-competitive. If the city attorney concludes that the challenged terms and conditions of any co-location agreement are in bad faith and anti-competitive, the city attorney may institute proceedings before the hearing examiner seeking revocation of any or all land use or other authorizations granted by the city with respect to the existence or operation of such facility; however, the city may, at its sole discretion, withdraw or refrain from initiating a revocation proceeding until such time as the aggrieved applicant makes payment or reaches and complies with an agreement with the city setting a schedule for payment of all reasonably anticipated costs to be incurred by the city in a revocation proceeding before the hearing examiner.

Upon receipt of a revocation recommendation from the city attorney, the hearing examiner shall conduct all necessary proceedings and reach a determination as to whether the terms and conditions of the challenged co-location agreement are in bad faith and anti-competitive. The hearing examiner shall have authority to revoke any and all land use permits or other authorizations granted by the city with respect to the existence and operation of telecommunications facilities owned or controlled by any provider found to be in violation of this section or impose

lesser sanctions as provided in section 74. Upon a determination by the hearing examiner to revoke permits or authorizations enabling the existence or operation of any facility(ies) or improvement(s) located within the city, the affected provider shall remove such facility(ies) in the time and manner provided in section 75 of this ordinance.

Notwithstanding provisions found elsewhere in city codes, appeals of any hearing examiner decision issued under this section shall be before the King County Superior Court, and must be filed and served within twenty-one days of the issuance of such decision as provided in RCW 36.70C.040(3).

Sec. 85. Design criteria.

(1) As provided above, new facilities shall be designed to accommodate co-location, unless the applicant demonstrates why such design is not feasible for economic, technical, or physical reasons.

(2) Facilities shall be architecturally compatible with the surrounding buildings and land uses in the zoning district and screened or otherwise integrated, through location and design, to blend in with the existing characteristics of the site.

(a) Setback. A tower's setback shall be measured from the base of the tower to the property line of the parcel on which it is located. In residential districts and residential land use areas, where permitted, towers shall be set back from all property lines a distance equal to 100% of tower height as measured from ground level, except for unusual geographic limitations or other public policy considerations, as determined in the city's sole discretion. All other towers shall comply with the

minimum setback requirements of the area in which they are located in all other zoning districts, unless there are unusual geographical limitations or other public policy considerations as determined in the sole and absolute discretion of the city.

Such considerations shall include by way of illustration and not limitation, but are not limited to:

(i) Impact on adjacent properties;

(ii) Alternative sites for personal wireless facilities; and

(iii)The extend to which screening and camouflaging will mitigate the affects of the personal wireless facilities.

(b) Public way setback exception. The setback requirement may be waived if the antenna and antenna support structure are located in the city public way.

(c) View corridors. Due consideration shall be given so that placement of towers, antenna, and personal wireless service facilities do not obstruct or significantly diminish views of Mt. Rainier, Puget Sound or the Olympic Mountains.

(d) Color, marking, lights, signals and signs. Towers shall have a color generally matching the surroundings or background that minimizes their visibility, unless a different color is required by the FCC or FAA.

No signals, lights, or signs shall be permitted on towers unless required by the FCC or the FAA. Should

marking be required, in cases where there are residents located within a distance which is 300% of the height of the tower, then dual mode lighting shall be requested from the FAA and the residents located within said distance shall be notified.

(e) Equipment and structures. Ground level equipment, buildings, and the tower base shall be screened from public view. The standards for the equipment buildings are as follows:

(i) The maximum floor area is 300 square feet and the maximum height is limited to the height of a one-story building which design is consistent with the neighborhood. Except in unusual circumstances or for other public policy considerations the equipment building may be located no more than fifty feet (50′) from the tower or antenna, with any additional distance to be left to the discretion of the community development director . Depending upon the aesthetics and other related issues, the city, in its sole discretion, may approve multiple equipment structures or one or more larger structures.

(ii) Ground level buildings shall be screened from view by landscape plantings, fencing, or other appropriate means to satisfy city standards for Type I landscaping.

(iii)Equipment buildings mounted on a roof shall have a finish similar to the exterior building walls. Equipment for roof-mounted antenna may also be located within the building on which the antenna is mounted.

(iv)In instances where equipment buildings are located in residential zones, equipment

buildings shall comply with setback requirements and shall be designed so as to conform in appearance with nearby residential structures.

(v) Equipment buildings, antenna, and related equipment shall occupy no more than twenty-five percent (25%)of the total roof area of the building the facility is mounted on, which may vary in the city's sole discretion if co-location and an adequate screening structure is used.

(vi)Noise from antennae equipment should be reduced where possible to 30Db. Continual low frequency sounds such as hums, clicks, buzzes and the like should be avoided.

The use must be approved on a site plan or final development plan, as applicable.

(f) Federal requirements. All towers must meet or exceed current standards and regulations of the FAA, the FCC, and any other agency of the federal government with the authority to regulate towers and antennas. If those standards and regulations are changed, then personal wireless service providers governed by this ordinance shall bring their towers and antennas into compliance with the revised standards and regulations within three (3) months of their effective date or the timelines provided by the revised standards and regulations, whichever time period is longer. The revised standards and regulations are not retroactively applicable to existing providers, unless otherwise provided or permitted by federal law. Failure to bring towers and antennas into compliance with the revised standards and regulations shall constitute grounds for the city to remove a provider's facilities at the provider's expense.

(g) Building codes; safety standards. To ensure the structural integrity of towers, the owner of a tower shall ensure that it is maintained in compliance with standards contained in applicable city building codes and the applicable standards for towers that are published by the Electronic Industries Association ("EIA"), as amended from time to time. If, upon inspection, the city concludes that a tower fails to comply with such codes and standards and constitutes a danger to persons or property, then upon notice being provided to the owner of the tower, the owner shall have thirty (30) days to bring the tower into compliance with such standards. If the owner fails to bring its tower into compliance within thirty (30) days, the city may remove the tower at the owner's expense.

(h) Structural design. Towers shall be constructed to the EIA Standards, which may be amended from time to time, and to all applicable construction/building codes. Further, any improvements or additions to existing towers shall require submission of site plans stamped by a professional engineer which demonstrate compliance with the EIA Standards and all other good industry practices. The plans shall be submitted and reviewed at the time building permits are requested.

(i) Fencing. A well-constructed wall, or wooden fence not less than six feet in height from the finished grade shall be provided around each personal wireless service facility. Fencing should be colored or should be of a design which blends into the character of the existing environment. Access to the facility shall be through a locked gate. The use of chain link, plastic, vinyl, or wire fencing is prohibited unless it is fully screened from public view through the use of either climbing evergreen shrubs on the fence or evergreen shrubs equal to the height

of the fence and consistent with the city's Type I landscaping standards.

(j) Tower and antenna height.

(i) All applicants for approvals and/or permits required by the city for towers or antennas must demonstrate through engineering evidence that the height of the proposed tower and/or antenna is the minimum height necessary to satisfactorily fulfill the facility's intended function.

(ii) No tower or antenna that is taller than the minimum height required, based on engineering evidence, shall be approved or otherwise permitted. Engineering evidence reviewed and considered by the city may include information obtained through the third party review process set forth in section 90.

(iii)No tower or mount shall exceed 80 feet; provided that:

(A) A conditional use permit may be issued by the hearing examiner to allow a tower or mount up to but not exceeding one hundred twenty feet (120') if the applicant can show by clear and convincing evidence that the additional height is necessary to allow for collocation of one or more additional facilities on the proposed tower; and

(B) The applicant presents a binding agreement with another provider ready, willing and able to collocate its facility on the proposed tower at or within a reasonable time of its completion, but not more than ninety (90) days following completion, except for conditions or circumstances outside the control

of the parties wishing to effectuate the collocation agreement related to the tower at issue; or, the applicant presents a construction plan calling for collocation of more than one facility belonging to the applicant on the proposed tower at or within a reasonable time of its completion, but not more than ninety (90) days following completion, except for conditions or circumstances outside the control of the applicant; and

(C) In the event that collocation of an additional facility has not occurred on any tower granted approval for a height exceeding eighty (80) feet within the time period set forth above, the city may order removal or modification of the facility at the owner's expense as provided in this ordinance; and,

(D) In considering the application for a conditional use permit under this section, the hearing examiner shall evaluate the matter and impose conditions consistent with subsections 85(2)(j)(i) and (ii) and other relevant provisions of this ordinance.

(k) Antenna support structure safety. The applicant shall demonstrate that the proposed antenna and support structure are safe and the surrounding areas will not be negatively affected by support structure failure, falling ice, or other debris or interference. All support structures shall be fitted with anti-climbing devices, as approved by the manufacturers.

(l) Required parking. If the cell site is fully automated, the location for one parking space for maintenance visits shall be designated on the site plan. If the site is not automated, adequate parking shall be reserved on the site plan for on-site employees.

(m) Tower separation. In no case shall towers be located closer than five hundred feet (500') from another tower whether it is owned or utilized by applicant or another provider, unless the city manager designates areas where multiple towers can be located in closer proximity following a third party review initiated upon receipt of an application warranting such study.

(n) Antenna criteria. Antenna on or above a structure shall be subject to the following:

(i) The antenna shall be architecturally compatible with the building and wall on which it is mounted, and shall be designed and located so as to minimize any adverse aesthetic impact.

(ii) The antenna shall be mounted on a wall of an existing building in a configuration as flush to the wall as technically possible and shall not project above the wall on which it is mounted unless it must be for technical reasons. In no event shall an antenna project more than sixteen feet (16') above the roof line including parapets.

(iii)The antenna shall be constructed, painted, or fully screened to match as closely as possible the color and texture of the building and wall on which it is mounted.

(iv)The antenna may be attached to an existing conforming mechanical equipment enclosure which projects above the roof of the building, but may not project any higher than the enclosure.

(v) If an accessory equipment shelter is present, it must blend with the surrounding buildings in architectural character and color.

(vi)The structure must be architecturally and visually (color, size, bulk) compatible with surrounding existing buildings, structures, vegetation, and uses. Such facilities will be considered architecturally and visually compatible if they are camouflaged to disguise the facility.

(vii) Site location and development shall preserve the pre-existing character of the site as much as possible. Existing vegetation should be preserved or improved, and disturbance of the existing topography of the site should be minimized, unless such disturbance would result in less visual impact of the site on the surrounding area. The effectiveness of visual mitigation techniques must be evaluated by the city, in the city's sole discretion.

(viii) For installations or buildings greater than thirty feet (30') in height, see other applicable provisions of this ordinance. In addition to the other requirements of this ordinance, on buildings thirty feet (30') or less in height, the antenna may be mounted on the roof if the following additional criteria are satisfied:

(A) The city finds that it is not technically possible or aesthetically desirable to mount the antenna on a wall.

(B) No portion of the antenna or base station causes the height of the building to exceed the limitations set forth herein.

(C) The antenna or antennas and related base stations cover no more than an aggregate total of twenty-five percent (25%) of the roof area of a building, which may vary in the city's sole discretion, if co-locating and an adequate screening structure are used.

(D) Roof mounted antenna and related base stations are completely screened from view by materials that are consistent and compatible with the design, color, and materials of the building.

(E) No portion of the antenna may exceed sixteen feet (16') above the height of the existing building.

(ix) If a proposed antenna is located on a building or a lot subject to a site review, approval is required prior to the issuance of a building permit.

(x) No antenna shall be permitted on property designated as an individual landmark or as a part of a historic district, unless such antenna has been approved in accordance with city ordinances.

(xi) No personal wireless service provider or lessee or agent thereof shall fail to cooperate in good faith to accommodate co-location with competitors. If a dispute arises about the feasibility of co-locating, the city manager may require a third party technical study, at the expense of either or both parties, to resolve the dispute.

(xii) No personal wireless service provider or lessee shall fail to assure that its antenna complies at all times with the current applicable FCC standards. After installation, but prior to putting the

antenna in service, each provider shall submit a certification by an independent professional engineer to that effect. In the event that an antenna is co-located with another antenna, the certification must provide assurances that FCC approved levels of electromagnetic radiation will not be exceeded by the co-location.

(xiii) No antenna shall cause localized interference with the reception of any other communications signals including, but not limited to, public safety, television, and radio broadcast signals.

(xiv) No person shall locate an antenna or tower for wireless communications services upon any lot or parcel except as provided in this ordinance.

(3) Setback from street. Unless there are unusual geographic limitations or other public policy considerations, as determined in the city's sole discretion, no such antenna, antenna array, or its support structure shall be erected or maintained closer to any street than the minimum setback for the zone in which it is located unless otherwise waived or exempt.

(4) Guy wires restricted. No guy or other support wires shall be used in connection with such antenna, antenna array, or its support structure except when used to anchor the antenna, antenna array, or support structure to an existing building to which such antenna, antenna array, or support structure is attached; however, the public works director may permit the temporary use of guy wires where such use is required in an emergency or other circumstances that are in the interest of public health and safety, but in no event should such temporary use be allowed for more than thirty (30) days.

Sec. 86. Permits required. Where a tower or antenna support structure will be sixty feet (60) or less in height, and such facility is not otherwise exempt from coverage by this ordinance, in addition to the other provisions of this ordinance, an applicant will be required to obtain design review approval as set forth in DMMC 18.58. In the event that a proposed tower or antenna support structure will be located in a residential zone, or an unscreened tower in the downtown area, or will be more than 60 feet in height, in addition to the other provisions of this ordinance, an applicant will be required to obtain a conditional use permit. With respect to the placement of antenna on a tower or antenna support structure, the requirements for a conditional use permit or design review will be applicable based on the height of the tower and antenna or mount and antenna unless this ordinance provides other requirements to the contrary.

To meet the standards of this ordinance, a personal wireless service facility must also comply with the other requirements under this ordinance and, for antennas attached to the roof or sides of a building at least thirty feet (30') in height, an existing tower, a water tank, or a similar structure:

(1) Antennas mounted on existing structures in the commercial zones, not exceeding 16 feet in height, may be permitted following design review approval as provided in DMMC 18.58 and submittal of an affidavit of compliance, with this Ordinance and other city regulations.

(2) Antennas, antenna arrays, and support structures not on publicly-owned property shall not extend more than sixteen 16 feet above the highest point of the structure on which they are mounted. The antenna, antenna array, and their support structure shall be

mounted so as to blend with the structure to which the antenna is attached. The antenna and its support structure shall be designed to withstand a wind force of one hundred miles per hour (100 mph) without the use of supporting guy wires. The antenna, antenna array, and their support structure shall be a color that blends with the structure on which they are mounted.

(3) To the extent that antenna are attached to electric, phone or light poles and such antenna are no more than two feet (2') in height, collocation and building permits will be required, but such antenna(s) shall not be subject to setbacks and screening requirements.

Sec. 87. Inspection requirements.

Each year after a facility becomes operational, the facility operator shall conduct a safety inspection in accordance with the EIA and FCC Standards and within sixty (60) days of the inspection file a report with the city manager. Submission of a copy of FCC required, and duly filed, safety inspection report, or the facility operator's maintenance reports for the prior twelve months in the event no FCC report is required for such year, shall satisfy the requirements of this section.

Sec. 88. Landscaping/screening.

(1) Landscaping. Landscaping, as described herein, shall be required to screen personal wireless service facilities as much as possible, to soften the appearance of the cell site. The city may permit any combination of existing vegetation, topography, walls, decorative fences or other features instead of landscaping, if they achieve the same degree of screening as the required landscaping. If the antenna is mounted flush on an existing building, and

other equipment is housed inside an existing structure, landscaping shall not be required.

(2) Screening. The visual impacts of a personal wireless service facility shall be mitigated through landscaping or other screening materials at the base of the tower and ancillary structures. The following landscaping and buffering shall be required around the perimeter of the tower and accessory structures, except that the city may waive the standards for those sides of the facility that are not in public view. Landscaping shall be installed on the outside of fences. Further, existing vegetation shall be preserved to the maximum extent practicable and may be used as a substitute for or as a supplement to landscaping requirements.

(3) Landscaping and screening requirements may be waived by the city where such measures are not in the public interest.

(4) In the event that landscaping and/or screening is not maintained at the required level, the city after giving thirty (30) days advance written notice may maintain or establish the landscaping and/or screening. All expenses incurred by the city under this section shall constitute a civil debt owing to the city jointly and severally by the owner(s) and lessee(s) which debt shall be collectible in the same manner as any other civil debt.

Sec 89.Non-Use/abandonment

(1) Abandonment. No less than 30 days prior to the date that a personal wireless service provider plans to abandon or discontinue operation of a facility, the provider must notify the city of Des Moines by certified U.S. mail of the proposed date of abandonment or

discontinuation of operation. In the event that a licensed carrier fails to give notice, the facility shall be considered abandoned upon the city's discovery of discontinuation of operation. Upon such abandonment, the provider shall have 60 days or additional period of time determined in the reasonable discretion of the city within which to:

(a) Reactivate the use of the facility or transfer the facility to another provider who makes actual use of the facility; or

(b) In the event that abandonment as defined in this Ordinance occurs due to relocation of an antenna at a lower point on the antenna support structure, reduction in the effective radiated power of the antenna or reduction in the number of transmissions from the antennas, the operator of the tower shall have six months from the date of effective abandonment to co-locate another service on the tower. If another service provider is not added to the tower, then the operator shall promptly dismantle and remove that portion of the tower which exceeds the minimum height required to function satisfactorily. Notwithstanding the forgoing, changes which are made to personal wireless facilities which do not diminish their essential role in providing a total system shall not constitute abandonment. However, in the event that there is a physical reduction in height of substantially all of the providers towers in the city or surrounding area then all of the towers within the city shall similarly be reduced in height.

(2) Dismantle and removal facility. If the tower, antenna, foundation, and facility are not removed within the sixty (60) days time period or additional period of time allowed by the city, the city may remove such tower, antenna, foundation, and related facility at the

provider's expense. If there are two or more providers co-locating on a facility, except as provided for in the paragraph above this provision shall not become effective until all providers cease using the facility.

At the earlier of sixty (60) days from the date of abandonment without reactivating or upon completion of dismantling and removal, city approval for the facility shall automatically expire.

Sec. 90. Third party review. Personal wireless service providers use various methodologies and analyses, including geographically-based computer software, to determine the specific technical parameters of their services and low power mobile radio service facilities, such as expected coverage area, antenna configuration, topographic constraints that affect signal paths, etc. In certain instances, a third party expert may need to review the technical data submitted by a provider. The city may require a technical review as part of a permitting process. The costs of the technical review shall be borne by the provider.

The selection of the third party expert may be by mutual agreement between the provider and the city, or at the discretion of the city, with a provision for the provider and interested parties to comment on the proposed expert and review its qualifications. The expert review is intended to address interference and public safety issues and be a site-specific review of technical aspects of the facilities or a review of the providers' methodology and equipment used and not a subjective review of the site which was selected by a provider. Based on the results of the expert review, the city may require changes to the provider's application. The expert review shall address the following:

(1) The accuracy and completeness of submissions;

(2) The applicability of analysis techniques and methodologies;

(3) The validity of conclusions reached; and

(4) Any specific technical issues designated by the city.

Chapter 20.08 - Construction

Sec. 91. Construction standards. No person shall commence or continue with the construction, installation or operation of telecommunications facilities within the city except as provided in this ordinance.

Sec. 92. Construction codes. Telecommunications facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations including, but not limited to, the National Electrical Safety Code. Telecommunication facilities shall comply with the city's Building and Construction Code, Title 14 DMMC. In the event of a conflict between Title 14 and this ordinance, this ordinance applies.

Sec. 93. Construction permits. No person shall construct or install any telecommunications facilities within the city without first obtaining a construction permit therefore, provided, however:

(1) No permit shall be issued for the construction or installation of telecommunications facilities within the city unless the telecommunications carrier has

filed a registration statement with the city pursuant to this ordinance.

(2) No permit shall be issued for the construction or installation of telecommunications facilities in the public ways unless the telecommunications carrier has applied for and received a franchise pursuant to this ordinance.

(3) Unless otherwise provided by law, franchise or license, no permit shall be issued for the construction or installation of telecommunications facilities without payment of all fees pursuant to this ordinance.

(4) No permit shall be issued to cut any public way, the surface of which is less than five (5) years old.

Sec. 94. Applications. Applications for permits to construct telecommunications facilities shall be submitted upon forms provided by the city. The applicant shall pay all associated fees and shall include any additional information as requested by the city manager or designee. The application shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

(1) That the facilities will be constructed in accordance with all applicable codes, rules and regulations.

(2) The location and route of all facilities to be installed on existing utility poles.

(3) The location and route of all facilities to be located under the surface of the ground, including the

line and grade proposed for the burial at all points along the route which are within the public ways.

(4) The location of all existing underground utilities, conduits, ducts, pipes, mains and installations which are within the public ways along the underground route proposed by the applicant.

(5) The location of all other facilities to be constructed within the city, but not within the public ways.

(6) The construction methods to be employed for protection of existing structures, fixtures and facilities within or adjacent to the public ways.

(7) The location, dimension and types of all trees within or adjacent to the public ways along the route proposed by the applicant, together with a landscape plan for protecting, trimming, removing, replacing and restoring any trees or areas to be disturbed during construction.

Sec. 95. Engineer's certification. Unless otherwise provided in a license or franchise, all permit applications shall be accompanied by the certification of a registered professional engineer that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations. The engineer shall provide a certificate of the construction cost estimate.

Sec. 96. Traffic control plan. All permit applications which involve work on, in, under, across or along any public ways shall be accompanied by a traffic control plan demonstrating the protective measures and devices that will be employed.

Sec. 97. Issuance of permit. Within forty-five (45) days after submission of all plans and documents required of the applicant and payment of necessary permit fees, the city manager or designee, if satisfied that the application, plans and documents comply with all requirements of this ordinance, shall issue a permit authorizing construction of the facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as the city manager or designee may deem necessary or appropriate.

Sec. 98. Construction schedule. The permittee shall submit a written construction schedule to the city manager or designee ten (10) working days before commencing any work in or about the public ways . The permittee shall further provide written notification to the city manager or designee not less than five (5) working days in advance of any excavation or work in the public ways.

Sec. 99. Compliance with permit. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The city manager or designee and his or her representative shall be provided access to the work and such further information as he or she may require to ensure compliance with such requirements.

Sec. 100. Display of permit. The permittee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by the city manager or designee at all times when construction work is occurring.

Sec. 101. Survey of underground facilities. If the construction permit specifies the location of facilities by depth, line, grade, proximity to other facilities or other standards, the permittee shall cause the location of such facilities to be verified by a registered Washington land surveyor. The permittee, at its expense, shall relocate any facilities which are not located in compliance with permit requirements.

Sec. 102. Noncomplying work. Upon order of the city manager or designee, all work which does not comply with the permit, the approved plans or specifications for the work, or the requirements of this ordinance shall be removed.

Sec. 103. Completion of construction. The permittee shall promptly complete all construction activities so as to minimize disruption of the public ways and other public and private property. All construction work authorized by a permit within public ways , including restoration, must be completed within ninety (90) days of the date of issuance or at such other interval as the city may specify in writing upon issuance of the permit.

Sec. 104. As-built drawings. Within thirty (30) days after completion of construction, the permittee shall furnish the city manager or designee with two (2) complete sets of plans, drawn to scale and certified to the city as accurately depicting the location of all telecommunications facilities constructed pursuant to the permit.

Sec. 105. Restoration of improvements. Upon completion of any construction work, the permittee shall promptly repair, but in no event longer than such time as may be established by the city during permit review, any

and all public and private property, improvements, fixtures, structures and facilities which are damaged during the course of construction, restoring the same to their condition before construction commenced.

Sec. 106. Landscape restoration.

(1) All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, operation, repair or replacement of telecommunications facilities, which is done pursuant to a franchise, license or permit, shall be replaced or restored to the condition existing prior to performance of the work.

(2) All restoration work within the public ways shall be done in accordance with landscape plans approved by the city.

Sec. 107. Location of facilities. Unless otherwise required in current or future city ordinances regarding underground construction requirements, all facilities shall be constructed, installed and located in accordance with the following terms and conditions:

(1) Telecommunications facilities shall be installed within an existing underground duct or conduit whenever excess capacity exists within such utility facility.

(2) A franchisee with written authorization to install overhead facilities shall install its telecommunications facilities on pole attachments to existing utility poles only, and then only if surplus space is available.

(3) Whenever all existing telephone, electric utilities, cable facilities or telecommunications facilities are located underground within public ways , a franchisee with written authorization to occupy the same public ways must also locate its telecommunications facilities underground.

(4) Whenever all new or existing telephone, electric utilities, cable facilities or telecommunications facilities are located or relocated underground within public ways, a franchisee that currently occupies the same public ways shall concurrently relocate its facilities underground at its expense.

Sec. 108. Conduit occupancy. In furtherance of the public purpose of reduction of public way excavation, it is the goal of the city to encourage both the shared occupancy of underground conduit as well as the construction, whenever possible, of excess conduit capacity for occupancy of future right-of-way occupants. Therefore, if a franchisee is constructing underground conduit for its own telecommunications facility, and the city reasonably determines such construction is in an area in which another telecommunications provider(s) may also construct telecommunications facilities in the future, city may require the franchisee to construct excess conduit capacity in the public ways, provided the expense of such excess capacity shall be borne by the city (calculated as the difference between what franchisee would have paid for the construction of its conduit and the additional cost only of the excess conduit). Franchisee may either lease the excess conduit to city at a rate of one dollar ($1.00) for the term of the franchise (in which case the city will be permitted to sublease the excess conduit at its sole discretion), or franchisee may manage the excess conduit itself and be permitted to charge a reasonable market lease

rate for occupancy of the additional conduit space, provided such lease revenues shall be first applied to reimburse city for its actual contribution to the construction of the excess conduit (plus interest compounded at the rate the city invested its funds during the time in question).

Sec. 109. Franchisee occupancy of city owned conduit. In furtherance of the same objectives of section 108 above, if city owns or leases conduit in the path of franchisee's proposed telecommunications facilities, and provided it is technologically feasible for franchisee to occupy the conduit owned or leased by city, franchisee shall be required to occupy the conduit owned or leased by city in order to reduce the necessity to excavate the public way. Franchisee shall pay to city a fee for such occupancy which shall be the cost franchisee would have expended to construct its own conduit from the outset, as certified by the Franchisee's engineer and approved by the city engineer. City and franchisee may agree to amortize the fee through annual payments to city over the term of the franchise, including the time value of money.

Sec. 110. Construction surety. Prior to issuance of a construction permit, the permittee shall provide a construction bond, as provided in this ordinance.

Sec. 111. Compliance with one number locator service. All licensees and franchisees shall, before commencing any construction in the public ways, comply with all regulations of 19.122 RCW, the One Number Locator Service.

Chapter 20.09 - Fees

Sec. 112. Pre-application conference and application fee. Prior to the acceptance of an application by the city, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of the application fee is to ensure the recovery of city costs and expenses associated with the review of the application, including but not limited to actual costs of city staff time and resources as well as any outside consultation expenses which the city reasonably determines are necessary to adequately review and analyze the application. The application fee shall be established by resolution in the sole discretion of the city council and shall be a minimum of Two Thousand Five Hundred Dollars ($2,500.00), with the maximum fee established depending upon estimated reasonable city costs and expenditures in review of the application. Disputes in the amount required by city shall be resolved by the hearing examiner established pursuant to section 121 of this ordinance. All franchisee and licensee applicants shall deposit the application fee with the city. This application fee shall be applied towards actual expenses and costs of the city. Any unencumbered application fees shall be refunded to the applicant upon written request of the applicant, but in no event earlier than sixty (60) days after granting or denial of the permit.

Sec. 113. Refund. An applicant whose license or franchise application has been withdrawn, abandoned or denied shall, within sixty (60) days of its application and review fee payment, be refunded the balance of its deposit under this section, less all ascertainable costs and expenses incurred by the city in connection with the application.

Sec. 114. Other city costs. All grantees shall, within thirty (30) days after written demand therefore, reimburse the city for all direct and indirect costs and expenses incurred by the city in connection with any modification, amendment, renewal or transfer of the license or franchise.

Sec. 115. Reserved compensation for public ways. The city reserves its right to fix a fair and reasonable compensation to be paid for the authorization granted to a grantee including permit fees and charges as provided in DMMC 12.04, the city's Right-Of Way Use Code. Nothing in this ordinance shall prohibit the city and a grantee from agreeing upon the compensation.

Sec. 116. Compensation for city property. If the right is granted, by lease, license, franchise or other manner, to use and occupy city property for the installation or use of telecommunications facilities, the compensation to be paid shall be fixed by the city.

Sec. 117. Construction permit fee. Prior to issuance of a construction permit for a project on, under, over or through city property, including rights-of-way, the permittee shall pay a permit fee equal to one thousand dollars ($1,000) or .75 percent of the estimated cost of constructing the telecommunications facilities, as certified by the applicant's engineer and approved by the city engineer, whichever is greater. The purpose of the construction permit fee shall be to recover city's actual attributable costs, expenses, damage or public way value diminution as a result of permittee's occupancy of the public way. City hereby finds that it must at this time attribute costs, expenses, damage, and diminution of value to permittee until such time as actual costs can be ascertained. This results from the inability of city to

ascertain the number and type of all public way permittees hereunder as well as the extent and nature of all future such occupancy. Therefore, the city shall within six (6) months of the effective date of this ordinance commence a study to analyze the value of city public ways, after which the city shall review the fees of this chapter and DMMC 12.04, the city's Right-of-Way Use Code, and adjust them to the extent city determines in its sole discretion is necessary, if any, to more accurately represent ascertainable actual costs associated with future permittee's occupancy. In no event shall construction permit fees received prior to such study and analysis be refunded or increased.

Sec. 118. Annual fees. Each grantee shall pay an annual fee to the city equal to the city's costs in connection with reviewing, inspecting and supervising the use and occupancy of the public way.

Sec. 119. Regulatory fees and compensation not a tax. The fees, charges and fines provided for in this chapter are separate from, and additional to, any and all federal, state, local, and city taxes as may be levied, imposed or due from a telecommunications carrier or provider, its customers or subscribers or on account of the lease, sale, delivery or transmission of telecommunications services.

Sec. 120. City manager authorized to set and modify fees. The city manager is authorized to set or modify any and all fees, charges or assessments established under this ordinance by administrative order(s) which shall be filed with and maintained by the city clerk.

Chapter 20.10. - Appeals.

Sec. 121. Appeal of administrative decision. A decision of the city manager or designee made in accordance with this title, including assessment of fees as provided herein, shall be considered a final administrative decision. A person aggrieved by a decision of the city manager or designee made pursuant to this ordinance may appeal such decision to the hearing examiner in accordance with the Hearing Examiner Code, 18.94 DMMC. The time and form of such appeals is provided in DMMC 18.94.114.

Chapter 20.11 - Miscellaneous.

Sec. 122. Context. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number.

Sec. 123. DMMC 18.32.030 and sections 1 (24.44.030) and 28 of Ordinance No. 175 as amended by section 8 of Ordinance No. 248, as amended by section 1 of Ordinance No. 391 as amended by section 5 of Ordinance No. 445 as amended by section 4 of Ordinance No. 793 as amended by section 7 of Ordinance No. 1106 are amended to read as follows:

> **18.32.030. Uses requiring conditional use permit.** The following uses may locate subject to the issuance of a conditional use permit processed as provided in the hearing examiner code:

(1) Cemeteries; provided:

(a) No building shall be located closer than 100 feet from a boundary line;

(b) A protective fence and a landscaped strip of evergreen trees and shrubs at least 10 feet in width shall be installed on all common boundary lines with R zoned property;

(2) Columbariums, crematories, and mausoleums; provided, these uses are specifically excluded from all R zones unless inside a cemetery;

(3) Commercial establishments or enterprises involving large assemblages of people or automobiles as follows; provided, these uses are specifically excluded from all R zones:

(a) Amusement parks;

(b) Boxing and wrestling arenas;

(c) Ballparks;

(d) Fairgrounds and rodeos;

(e) Golf driving ranges;

(f) Labor camps (transient);

(g) Open-air theaters;

(h) Race tracks, drag strips, motorcycle hills, and Go-Kart tracks;

(i) Stadiums;

(4) Fire stations and public works maintenance and storage facility buildings when located in any R zone; provided, the following conditions shall be conformed to:

(a) All buildings and structures shall maintain a distance of not less than 20 feet from any property line that is a common property line with R zoned property; and

(b) A building from which fire-fighting equipment emerges onto a street shall maintain a distance of 35 feet from such street.

(5) Hospitals, mental and alcoholic; provided, they are specifically excluded from all RS, RD, RM-2,400 and RM-1,800 zones;

(6) Institutions for training of religious orders;

(7) Antenna systems which:

(a) Are not within the limitation of DMMC 18.08.020(2)(h) or DMMC 18.20.020(8); or

(b) Consist of parabolic antennas such as microwave dishes; or

(c) Consist of a broadcasting or communication stations which transmit electromagnetic radiation;

(8) Recreational areas, commercial, including yacht clubs, beach clubs, tennis clubs, parks, ski areas, marinas, and similar activities;

(9) Universities and colleges, including dormitories and fraternity and sorority houses when on campus;

(10) Fraternal societies as approved by the planning agency when located in an RS zone;

(11) Day-care centers, but excluding family day-care providers subject to the following minimum conditions:

(a) A play yard or equipment yard shall not be located in any required side or front yard;

(b) All buildings and structures on the lot shall maintain a distance of not less than 20 feet from any property line that is common property line with RS classified property. If a greater setback is specified in a particular zone then the setback requirements of the particular zone shall prevail over the minimum setback set forth in this subsection;

(c) No day-care center shall be located within 150 feet of a highway commercial zone;

(d) State licensing standards for such facilities, chapter 388-73 WAC, shall be met;

(e) Such uses shall comply with the parking code requirements of 18.44 DMMC.

(12) Telecommunication facilities as described in the provisions of Title 20.

Sec. 124. Codification. Section 1 through 122 of this ordinance shall be codified as a new Title 20 DMMC, Telecommunications.

Sec. 125. Severability - Construction.

(1) If a section, subsection, paragraph, sentence, clause, or phrase of this ordinance is declared unconstitutional or invalid for any reason by any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

(2) If the provisions of this ordinance are found to be inconsistent with other provisions of the Des Moines Municipal Code, this ordinance is deemed to control.

Sec. 126. Effective date. This ordinance shall take effect and be in full force five (5) days after its passage, approval, and publication in accordance with law.

PASSED BY the city council of the city of Des Moines this 23rd day of October, 1997 and signed in authentication thereof this 23rd day of October, 1997.

/s/ Scott Thomasson
MAYOR

APPROVED AS TO FORM:

/s/ Gary McLean
City Attorney

ATTEST:

/s/ Denis Staab
City Clerk

Published: October 29, 1997

LEGAL NOTICE
SUMMARY OF ADOPTED ORDINANCE
CITY OF DES MOINES

ORDINANCE NO. 1200, Adopted October 23, 1997.

DESCRIPTION OF MAIN POINTS OF THE ORDINANCE:

This ordinance relates to telecommunications; establishes requirements for telecommunication carriers and providers and standards for the granting and renewal of telecommunications franchises; provides for the regulation of use of public ways; provides for insurance, bonding and construction standards for telecommunications facilities located in public ways; establishes procedures for appeals of administrative decisions regarding telecommunications facilities; provides for enforcement of this ordinance; establishes requirements for antennas and personal wireless telecommunication facilities, including a purpose statement, definitions, exemptions, site selection criteria, priority of locations, priority on city property, co-location and design criteria, permit inspection requirements and landscaping requirements, non-use and abandonment provisions, third party review, and remedies; and adds a new Title 20 to the Des Moines Municipal Code.

The full text of the ordinance will be mailed without cost upon request.

DENIS STAAB
City Clerk

Published: October 29, 1997

(2)

Supreme Court, U.S.
FILED
DEC 10 2001
OFFICE OF THE CLERK

No. 01-596

In The

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON;
CITY OF AUBURN, WASHINGTON;
AND CITY OF DES MOINES, WASHINGTON,

Petitioners,

v.

QWEST CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICI CURIAE LOCAL GOVERNMENTS IN SUPPORT OF PETITIONERS

[Amici Listed On Inside Cover]

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CITY AND COUNTY OF SAN FRANCISCO, CA; CITIES OF ARCADIA, CA; BOSTON, MA; DEARBORN, MI; EMERYVILLE, CA; EUGENE, OR; FOSTER CITY, CA; FOUNTAIN VALLEY, CA; INDIANAPOLIS, IN; IRVINE, CA; KANSAS CITY, MO; LAS VEGAS, NV; LOS ANGELES, CA; MORENO VALLEY, CA; OCEANSIDE, CA; REDONDO BEACH, CA; SALT LAKE CITY, UT; SAN DIEGO, CA; SAN JOSE, CA; SAN LUIS OBISPO, CA; TUCSON, CA; WEST VALLEY, UT; COUNTIES OF CLARK, NV; SAN LUIS OBISPO, CA; MONTGOMERY, MD; AND PINAL, AZ

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. THE NINTH CIRCUIT'S HOLDING THAT THE CHALLENGED ORDINANCES EFFECTIVELY PROHIBITED TELECOMMUNICATIONS SERVICES AS A MATTER OF LAW CONFLICTS WITH THIS COURT'S DECISIONS UPHOLDING PRINCIPLES OF FEDERALISM 8

A. Preemption Under Section 253 Ordinarily Requires a Factual Inquiry 10

B. Congress Intended the Preemptive Scope of Section 253 to be Narrow 12

II. THE LACK OF CLARITY AS TO LOCAL AUTHORITY UNDER SECTION 253 IS CREATING CONFLICTS ACROSS THE COUNTRY AND IMPAIRING LOCAL GOVERNMENTS' ABILITY TO MANAGE PUBLIC RIGHTS-OF-WAY 14

A. The Ninth Circuit Decision Creates Confusion for Local Governments that Seek to Regulate Public Rights-of-Way 14

B. The *Auburn* Decision is Proliferating Litigation and Impairing Local Governments' Ongoing Ability to Protect Users of Public Rights-of-Way 16

CONCLUSION 20

LIST OF AMICI CURIAE COUNSEL ..... Appendix

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Aloha Airlines, Inc. v. Ahue, 12 F.3d 1498 (9th Cir. 1993) 11

AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366 (1999) ...2, 3

AT&T Wireless PCS, Inc. v. City Council of Virginia Beach, 155 F.3d 423 (4th Cir. 1998) 4

Atchison, T. & S.F.R. Co. v. Public Util. Comm'n, 346 U.S. 346 (1953) 9

BellSouth Telecomm. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001) 3, 10

Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491 (1984) 11

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 7

Cipollone v. Liggett Group, 505 U.S. 504 (1992) 8

City of Auburn v. Qwest Corp., 247 F.3d 966, *amended and superseded by* 260 F.3d 1160 (9th Cir. 2001) 5, 14

City of Auburn v. Qwest Corp., 260 F.3d 1160 (9th Cir. 2001) ..... *passim*

City of St. Louis v. Western Union Tel. Co., 149 U.S. 465 (1893) 16

Communications Telesystems Int'l v. California Pub. Util. Comm'n, 196 F.3d 1011 (9th Cir. 1999) 10

DeBuono v. NYSA-ILA Med. and Clinical Serv., 520 U.S. 806 (1997) 8

FDIC v. Meyer, 510 U.S. 471 (1994) 7

TABLE OF AUTHORITIES – Continued

Page

Hodge Drive-It-Yourself Co. v. City of Cincinnati, 284 U.S. 335 (1932) 16

Industrial Truck Ass'n v. Henry, 125 F.3d 1305 (9th Cir. 1997) 10, 11

Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) 8, 13

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 7

National Metro. Bank v. U.S., 323 U.S. 454 (1945) 7

Reno v. Flores, 507 U.S. 292 (1993) 7

Southern Pac. Co. v. City of Portland, 227 U.S. 559 (1913) 12, 16

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) 3, 10

FEDERAL STATUTES

47 U.S.C.

§ 152nt(c)(1) (2001) 14

§ 251(b)(1) 13

§ 251(c)(4)(B) 13

§ 251(d)(3)(C) 13

§ 253 ..... *passim*

§ 253(a) ..... *passim*

§ 253(b) 4, 14

§ 253(c) 5, 9, 13

TABLE OF AUTHORITIES – Continued

Page

§ 257 13

§ 541(b)(3)(B) 13

Telecommunications Act of 1996, Pub. L. 104, 110 Stat. 56 (Telecommunications Act) 2

ADMINISTRATIVE AGENCY ORDERS

In re TCI Cablevision of Oakland County, Inc. 12 F.C.C.R. 21396 (1997) 15

In the Matter of Section 257 Proceedings to Identify and Eliminate Market Entry Barriers for Small Businesses 12 F.C.C.R. 16802 (1997) 11

Public Notice, "Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act," FCC 98-295 (rel. Nov. 17, 1998) 3

LEGISLATIVE MATERIALS

H.R. Conf. Rep. No. 1555 (1995) 14

H.R. Conf. Rep. No. 458, 104th Cong. (2d Sess. 1996) 14

S. Conf. Rep. No. 104-230, 104th Cong. (2d Sess. 1996) 3

OTHER TEXTS

Qwest Corp. v. City of Portland, Memorandum in Support of Motion for Summary Judgment, No. CV 01-1005 JE at 10 (D. Or. filed July 20, 2001) ("Qwest Memorandum") 17, 18

TABLE OF AUTHORITIES – Continued

Page

Underground Constr. Co., Inc. v. City and County of San Francisco, No. C-01-03707 MMC (N.D. Cal. filed Oct. 1, 2001) 17

Ian McCann & Steve Quinn, *Water Mains Flood Downtown*, Dallas Morning News, Sept. 5, 2000 19

Jason Lamers, *Latest Gas Line Break Adds to Woes*, Dallas Morning News Insert, Summer 1999 19

Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, Irving News, July 11-14, 1999 19

NTSB, *Pipeline Accident Report*, NTSB Number PAR-00/0 19

Webster's New Collegiate Dictionary 940 (9th ed. 1990)..... 15

STATEMENT OF INTEREST

Amici curiae are municipal and county governments, officials, and organizations throughout the United States.[1] We have a direct interest in this case because if the decision below is allowed to stand, it may significantly erode our traditional police power authority to regulate the use of public streets and to obtain fair compensation for the use of public property. Amici urge the Court to grant the petition for writ of certiorari and to reverse the judgment below.

Amici curiae include national organizations representing the interests of local governments. The National League of Cities, which represents more than 18,000 communities, is the oldest and largest national organization representing municipal governments. The International Municipal Lawyers Association has been an advocate and resource for local government attorneys in the United States and Canada since 1935. The National Association of Telecommunications Officers and Advisors has represented the telecommunications needs and interests of local governments for over 20 years. The Alliance for Community Media, with more than 1,000 members, supports legislation and regulation that advance community access to electronic media. The Texas Coalition of Cities for Utility Issues represents 110 communities and the Greater Metro Telecommunications Consortium represents Denver, Colorado and 28 neighboring communities.

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[1] In accordance with Rule 37.6, amici curiae state that no counsel for a party authored a brief in whole or in part, and no person or entity other than amici curiae, their counsel and members made a monetary contribution to the preparation or submission of the brief. This brief is filed with the consent of the parties, and letters of consent are being filed under Rule 37.2.

Amici also include approximately 30 individual cities and counties from thirteen states.

Congress enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (Telecommunications Act) to promote competition in the delivery of telecommunications services. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). Since its enactment, local governments have experienced a dramatic increase in the number of entities disrupting public streets by installing telecommunications facilities. The construction and maintenance of these facilities create significant stresses on local infrastructure such as roads, surface and underground public transportation facilities, sewer and water facilities, and gas, electric and other utility facilities. The increased density of facilities and construction activity disrupts individuals and businesses and increases public safety risks. The increased activity also increases stress on local government budgets. In response, many local governments have adopted measures to regulate and coordinate the use of public streets by telecommunications companies and others.

The Ninth Circuit's decision in *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001), Petitioners' Appendix (Pet. App.) 1a-36a, casts a shadow over these local efforts. The *Auburn* court struck down several local ordinances that were intended to manage public rights-of-way. Yet the decision below provides no clear guidance about how local governments may lawfully manage the demands on streets created by telecommunications competition. As a result, citing *Auburn*, Qwest and other companies are now asserting that a wide range of local regulations are preempted by section 253 of the Telecommunications Act. Local governments are being forced to spend vast amounts of time and money debating and

litigating the scope of their authority to protect the public interest through management of public streets. These costs are ultimately paid by local taxpayers.

Amici agree with petitioners that the Ninth Circuit's construction of section 253 conflicts with the Supreme Court's construction of similar statutory language in *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 389-90, and with interpretations of section 253 from the Eleventh Circuit, the Sixth Circuit, and the FCC. *See BellSouth Telecomm. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001); *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); Federal Communications Commission (FCC) *Public Notice*, "Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act," FCC 98-295 (rel. Nov. 17, 1998).[2] We write separately to emphasize that the *Auburn* decision has generated much heat but little light on an issue of extraordinary importance – the degree to which the Telecommunications Act affects local authority. We urge the court to grant the petition for a writ of certiorari to resolve the current confusion.

STATEMENT OF THE CASE

Congress intended the Telecommunications Act to enhance opportunities for competition among providers of telecommunications services. At the same time, Congress recognized that its "procompetitive, deregulatory" goals[3] had to be balanced against other important interests that might not be well-served by a deregulated

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[2] The FCC guidelines are available at <http://www.fcc.gov.Bureaus /Common___Carrier/PublicNotices/1998/fcc98295.txt.

[3] S. Conf. Rep. No. 104-230, at 1, 104th Cong. (2d Sess. 1996).

market. These include preserving universal service, protecting public safety and welfare, ensuring service quality, safeguarding consumer interests, and effectively managing public rights-of-way.

To serve these competing goals, section 253(a) of the Act preempts state and local laws that "prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications services.[4] But the Act also establishes two safe harbors for state and local actions: section 253(b) protects provisions aimed at promoting the public health, safety and welfare and section 253(c) protects provisions for managing rights-of-way and fair and reasonable compensation requirements for use and occupancy of the rights-of-way.

In *City of Auburn v. Qwest Corp.*, Pet. App. 1a-36a, the Ninth Circuit held that the challenged municipal ordinances violated section 253 as a matter of law. The court found that section 253(a) broadly restricts local regulations on telecommunications carriers and that, "[t]he preemption is virtually absolute. . . . " Pet. App. 24a.

The Ninth Circuit initially concluded that *each* of the following requirements (among others) *individually* has the effect of prohibiting service: (1) requiring companies to submit "lengthy and detailed" franchise applications, including information about legal, technical or financial qualifications, (2) requiring application fees ranging from an undetermined amount up to $5,000, (3) requiring a

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[4] The distinction between a prohibition and an effective prohibition relates only to how the result is accomplished and is not at issue in this case. A requirement that has the "effect of prohibiting" is a prohibition accomplished by indirect means or cumulative action, rather than a single legislative act. *See AT&T Wireless PCS, Inc. v. City Council of Virginia Beach*, 155 F.3d 423 (4th Cir. 1998). Only alleged effective prohibitions are at issue here.

public hearing before granting a franchise, (4) requiring companies to report on transfers of ownership shares, (5) retaining the authority to impose civil or criminal penalties for violations of city or state law, and (6) reserving discretion to grant, deny, or revoke the franchises. *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 981, *amended and superseded by* 260 F.3d 1160 (9th Cir. 2001).

On rehearing, the court amended its decision to provide that the municipal requirements *"in combination,* have the effect of prohibiting the provision of telecommunications services." Pet. App. 25a-26a (emphasis added). The court further modified its decision to note that its conclusion as to local authority to deny a franchise application "is based on the variety of methods and bases on which a city may deny a franchise, not the mere franchise requirement, or the possibility of denial alone." Pet. App. 27a n.11. Thus, upon rehearing, the court left local governments and telecommunications service providers without clear direction as to whether any particular provision by itself, or whether some combination of provisions, effectively prohibits service. Furthermore, the court did not explain why or how any of the requirements either individually or collectively necessarily had the effect of prohibiting service.

The court recognized that local requirements that have the effect of prohibiting service are not preempted if they constitute management of public rights-of-way. Pet. App. 27a. The court, however, interpreted the preservation of local authority in section 253(c) as a narrow exception to the general preemption set forth in section 253(a). Pet. App. 14a; 27a. The court concluded that section 253(c) offers a safe harbor only for regulations that represent "control over the right-of-way itself, not control over the companies with facilities in the right-of-way." Pet. App. 28a. It identified four aspects of the ordinances that,

it found, did not directly relate to management of the rights-of-way: (1) requiring "an extensive application process," including data to determine "the financial soundness, technical qualifications, and legal ability to provide telecommunications services," (2) imposing reporting requirements, including information about ownership and the transfer of ownership shares of the telecommunications company, (3) imposing certain conditions related to rates, terms, and conditions of service or requiring companies to provide excess capacity for use by cities or other users, and (4) retaining discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise on the basis of unnamed factors." Pet. App. 29a-32a. The court did not provide any statutory support for its interpretation that section 253(c) is limited to regulations that *directly* affect public rights-of-way, nor did it set forth any principles for distinguishing between right-of-way regulations and regulation of companies with facilities located in the rights-of-way.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ to resolve the conflicts identified in the petition between the Ninth Circuit's decision and decisions by the Supreme Court, the Eleventh Circuit and the Sixth Circuit, and to determine the preemptive scope of section 253.

In addition, amici believe that the sheer volume of legal errors in the Court of Appeals decision, combined with the powerful and widespread impact these errors are having on local communities, enhance the need for Supreme Court review. In addition to its erroneous conclusions on the merits, the *Auburn* decision reflects numerous errors that, taken together, have the effect of *reversing* the required judicial presumption *against* preemption. Among the most egregious of these errors:

- The Ninth Circuit did not construe the term "prohibition" in a manner consistent with its plain meaning. *See, e.g., FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (term not defined in a statute must be construed "in accordance with its ordinary and natural meaning"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (the question of preemption begins with "the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose") (internal citation omitted).
- The Ninth Circuit failed to apply the proper standard for reviewing a facial preemption challenge. The burden on a plaintiff making a facial challenge is heavy. Accordingly, the court should have presumed that the cities would exercise the discretion reserved to them by the challenged ordinances in a manner consistent with federal law. *See, e.g., California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1987) (if any potential set of permit conditions would withstand a preemption challenge, facial claim is defeated); *Reno v. Flores*, 507 U.S. 292, 300-01 (1993) (in facial challenge, plaintiff must establish that no circumstances exist under which law would be valid). The Ninth Circuit instead presumed that the cities would abuse their discretion.
- As detailed in the petition, the Ninth Circuit misapplied the standard for judgment on the pleadings set forth in Federal Rule of Civil Procedure 12(c). *National Metro. Bank v. U.S.*, 323 U.S. 454, 456-57 (1945) (where plaintiff moves for judgment on the pleadings, all allegations in defendant's response must be treated as established).

Qwest and other carriers are relying on these errors to assert sweeping challenges to local requirements across

the nation.[5] In the face of these challenges, local governments have two possible responses: engage in prolonged negotiations or litigation to enforce local laws, or refrain from adopting or enforcing regulations on right-of-way use that local officials believe are both consistent with the Telecommunications Act and *necessary* to protect the government, other rights-of-way users, and the public.

The Court should grant the writ to resolve conflicts as to how local governments' traditional police powers may be affected by section 253.

I. THE NINTH CIRCUIT'S HOLDING THAT THE CHALLENGED ORDINANCES EFFECTIVELY PROHIBITED TELECOMMUNICATIONS SERVICES AS A MATTER OF LAW CONFLICTS WITH THIS COURT'S DECISIONS UPHOLDING PRINCIPLES OF FEDERALISM.

Where federal law steps into an area of traditional state or local regulation, courts apply a presumption against preemption. *DeBuono v. NYSA-ILA Med. and Clinical Serv.*, 520 U.S. 806, 814 and n.8 (1997). This Court has repeatedly held that the presumption against preemption requires the scope of preemption to be construed narrowly, even where, as here, it is explicit in the statute. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (court must start with assumption that Congress will not cavalierly preempt state law). *See also Cipollone v. Liggett Group*, 505 U.S. 504, 518 (1992) (the presumption "reinforces the

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[5] While amici reserve their right to contest these challenges, because many communities lack the resources to do so, for purposes of this brief we adopt the broad reading Qwest and other carriers ascribe to *Auburn*.

appropriateness of a narrow reading" of express preemption). Regulating entities that use public rights-of-way is an area of traditional state regulation. *Atchison, T. & S.F.R. Co. v. Public Util. Comm'n*, 346 U.S. 346, 355 (1953) ("construction and use of public streets is a matter peculiarly of local concern").

The Ninth Circuit turned preemption analysis on its head. First, the court purported to acknowledge that only requirements that have the effect of prohibiting service are preempted, but its application of this limiting principle in fact imposed no limit at all. Indeed, the lack of substantive analysis as to what constitutes a prohibition reveals the court's assumption that virtually any inconvenience to telecommunications providers constitutes an effective prohibition. As a result, the court stated summarily that section 253(a)'s preemption "is *virtually absolute* . . . " and that it creates "a broad prohibition against state and local regulation. . . . " Pet. App. 24a, 14a (emphasis added).

Second, while the structure of the decision appears to reflect that the sole purpose of subsection (c) is to preserve local authority to manage and obtain compensation for use of the public rights-of-way, the court in practice applied subsection (c) as if it set forth the outer limits on local authority over telecommunications providers. The court effectively held that all local requirements are preempted unless they are specifically preserved. Pet. App. 27a. Moreover, the Court held that local requirements directed at telecommunications providers could "violate" section 253(c) even though that provision *preserves* rather than limits local authority. Pet. App. 29a, 32a. The court failed to recognize that local right-of-way regulations are preserved *even if* they effectively prohibit service. The court also failed to recognize that local regulations that

do not constitute right-of-way management are *nonetheless preserved* unless they prohibit or effectively prohibit service.

Both of these interpretations are inconsistent with proper preemption analysis. State and local authority should be preserved in the absence of a clear contrary intent by Congress. This proper analysis is reflected in the decisions of other circuits that have interpreted section 253. *See BellSouth Telecomm. v. Town of Palm Beach*, 252 F.3d at 1176, 1187-89 (section 253(a) contains the only substantive limitations on state and local regulation of telecommunications, and sections (b) and (c) preserve rather than limit state and local authority); *TCG Detroit v. City of Dearborn*, 206 F.3d at 624 (obligation to obtain a franchise and pay franchise fees is not in itself an effective prohibition subject to preemption under section 253(a)).[6]

A. Preemption Under Section 253 Ordinarily Requires a Factual Inquiry.

The Ninth Circuit's conclusion that section 253 broadly preempts local regulation is largely based on its erroneous decision that preemption was properly decided as a matter of law under the circumstances presented by the challenged ordinances. The court cites only a single case for this proposition, *Industrial Truck Ass'n v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997), Pet. App. 18a-19a. This case, which interprets the Occupational Safety and Health Act, provides no authority for how courts should analyze

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[6] Even a prior Ninth Circuit decision held that section 253 was "designed to prevent explicit prohibitions" and not to prevent all state and local regulation of telecommunications services. *Communications Telesystems Int'l v. California Pub. Util. Comm'n*, 196 F.3d 1011, 1017 (9th Cir. 1999).

the preemptive effect of section 253 for at least three reasons:

- There is no single answer to whether preemption is a question of law or requires factual analysis. This Court has found that factual development is necessary in some preemption contexts. *See, e.g., Brown v. Hotel & Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 511 (1984) (whether union dues collection ban is preempted by NLRA requires factual development).
- Unlike *Auburn, Industrial Truck* involved a form of preemption – "field preemption" – where state law "attempts to regulate conduct in a field that Congress intended the federal law exclusively to occupy." *Industrial Truck*, 125 F.3d at 1309. In such cases, the primary question – whether the challenged law addresses an issue or subject matter covered by the federal statutory scheme – can be determined based solely on the text of the challenged and allegedly preemptive laws.
- The cases cited in *Industrial Truck* are all cases involving ERISA – a statute containing "one of the broadest preemption clauses ever enacted. . . . " *Aloha Airlines, Inc. v. Ahue*, 12 F.3d 1498, 1501 (9th Cir. 1993) (internal citations omitted). Like OSHA preemption, the standard of review for ERISA preemption has little bearing on the meaning of the express preemption language in section 253.

Unlike both OSHA and ERISA, section 253 preemption depends, in the first instance, on the *effect* of the local measure, i.e., whether it has the effect of prohibiting the provision of service. It is difficult to imagine a more fact-based concept than "effect," the term Congress selected in section 253(a). Indeed, the FCC has interpreted the statute to require analysis of section 253 preemption "on a case-by-case basis . . . depending on the facts presented." *In the Matter of Section 257 Proceedings to Identify*

and Eliminate Market Entry Barriers for Small Businesses, 12 F.C.C.R. 16802, ¶107 (1997).

In concluding that preemption was properly decided as a matter of law, the Ninth Circuit reasoned that "there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity." Pet. 18a-19a. This reasoning frames the wrong question and reflects the court's inappropriate reliance on field preemption cases. In defining the scope of section 253 preemption in the context of a motion for judgment on the pleadings, the appropriate first question must be: Is there is a factual dispute about whether the challenged ordinances prohibit or have the effect of prohibiting telecommunications service?

While there might be extreme circumstances in which this question could be answered as a matter of law (where, for example, a city imposes preconditions on right-of-way use that only an incumbent telecommunications provider could satisfy), those cases will be the exception rather than the rule. Indeed, this Court has held that the question of whether regulations amount to a prohibition on service was not properly decided without development of a factual record. *Southern Pac. Co. v. City of Portland*, 227 U.S. 559, 573-74 (1913) (whether regulation amounted to a prohibition had to be decided on factual record). In most cases, finding that a local law has a prohibitive effect will require careful, factual inquiry into the actual or probable impact of the challenged requirements on telecommunications service providers.

B. Congress Intended the Preemptive Scope of Section 253 to be Narrow.

This Court should clarify that section 253(a) means what it says and does not give courts broad license to preempt state and local regulations. " '[T]he purpose of

Congress is the ultimate touchstone' in every pre-emption case." *Medtronic*, 518 U.S. at 485 (citations omitted). There is overwhelming evidence that Congress intended section 253(a) to preempt *narrowly*.

First, the plain language of section 253(c) preserves local authority to regulate and obtain compensation for use of public rights-of-way. Section 253(c) provides that "[n]othing in this section *affects* the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis. . . . " 47 U.S.C. § 253(c) (emphasis added). Congress intended traditional local authority over public rights-of-way to remain undisturbed *even if it has a prohibitive effect*.

Second, the language of section 253(a) bars *only prohibitions and effective prohibitions*. In contrast, other provisions of the Telecommunications Act preclude both prohibitions and other, less extreme, limitations or conditions. *See, e.g.*, 47 U.S.C. §§ 251(b)(1) and (c)(4)(B) (local exchange carriers may not prohibit or "impose unreasonable or discriminatory conditions or limitations on" certain activities) and § 541(b)(3)(B) (franchising authorities may not impose requirements that have "the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator . . . "). *See also* 47 U.S.C. § 257 (requiring the Federal Communications Commission to eliminate "barriers" to market entry); § 251(d)(3)(C) (preserving state regulations that do not "substantially prevent implementation" of purposes of section 251).

Third, Congress requires that section 253 be narrowly construed by providing that the 1996 amendments to the

Act "shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided. . . . " 47 U.S.C. § 152nt(c)(1).

Finally, the legislative history confirms that while Congress intended to eliminate restrictions that would prevent competitors from entering the telecommunications market, Congress did not intend to eliminate all costs or burdens on carriers that might result from state or local regulation. *See* H.R. Conf. Rep. No. 458 (2d Sess. 1996) (explaining that, under section 253(b), state laws or regulations that condition telecommunications activities to protect ratepayers from harm are not preempted, but explicit prohibitions on entry are). Congress considered and rejected language that would have significantly constrained local authority. *See* H.R. 1555, introduced May 3, 1995 (proposed section 243), which would have preempted all state and local requirements not expressly preserved.

In sum, if Congress had intended broadly to preempt local regulations affecting telecommunications providers, it would have done so expressly.

II. THE LACK OF CLARITY AS TO LOCAL AUTHORITY UNDER SECTION 253 IS CREATING CONFLICTS ACROSS THE COUNTRY AND IMPAIRING LOCAL GOVERNMENTS' ABILITY TO MANAGE PUBLIC RIGHTS-OF-WAY.

A. The Ninth Circuit Decision Creates Confusion for Local Governments that Seek to Regulate Public Rights-of-Way.

Initially, the Ninth Circuit held that a variety of requirements *individually* constituted effective prohibitions on service. *Auburn*, 247 F.3d at 981. Under that decision, public hearing requirements, franchise application fees, ownership transfer reporting requirements,

excess conduit requirements, detailed information requirements, retaining discretion to grant, deny, or revoke a franchise and the possible imposition of civil or criminal penalties, each would have constituted effective prohibitions. On rehearing, perhaps in recognition that its initial conclusion was unsustainably overbroad, the court held that the Washington ordinances "include several features that, *in combination*, have the effect of prohibiting the provision of telecommunications services." Pet. App. 25a-26a (emphasis added).

Unfortunately, the court's rehearing decision did not offer greater clarity or rationale for determining what constitutes an effective prohibition under section 253(a). In both its initial and rehearing decisions, the court failed to apply the ordinary and plain meaning of the term "prohibit," which is defined as "to forbid by authority" or "to prevent from doing something." *Webster's New Collegiate Dictionary* 940 (9th ed. 1990). Moreover, the lack of clarity in the court's rehearing decision gives carriers a foothold to challenge – and force local governments to defend – each and every one of the individual requirements at issue in *Auburn*.

Similarly, the Ninth Circuit stated that "right-of-way management means control over the right-of-way itself, not control over companies with facilities in the right-of-way." Pet. App. 28a.[7] The court's purported distinction between regulation of public streets and regulation of entities that use public streets is not viable. Indeed, this

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[7] The court's reliance for this distinction on the FCC's decision in *In re TCI Cablevision of Oakland County, Inc.* (Pet. App. 28a) is without any force. The FCC expressly stated that it was *not* resolving any section 253 claim or drawing any conclusions about the scope of power reserved to local governments by section 253(c). *See In re TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶7 (1997).

Court has recognized that the power to regulate public rights-of-way is broad, and includes the power to prescribe the terms and conditions upon which the streets may be used. *City of St. Louis v. Western Union Tel. Co.*, 149 U.S. 465, 469-70 (1893) (power to require payment for exclusive use of portion of streets is within power to regulate street use). *See also Southern Pac. Co. v. City of Portland*, 227 U.S. at 571-72 (power to designate street on which railroad tracks could be located implicitly included authority to fix terms of use); *Hodge Drive-It-Yourself Co. v. City of Cincinnati*, 284 U.S. 335, 337 (1932) (imposing license fees and insurance requirements on companies that lease cars derives from city's power to prescribe terms on which businesses may use streets for gain).

B. The *Auburn* Decision is Proliferating Litigation and Impairing Local Governments' Ongoing Ability to Protect Users of Public Rights-of-Way.

The Ninth Circuit's decision creates confusion and increases litigation for local governments trying to adopt or enforce requirements for companies that use public rights-of-way to provide telecommunications services. Companies are taking advantage of the lack of analysis in the *Auburn* decision to challenge virtually every local condition or restriction on their use of rights-of-way. While amici reserve the right to dispute Qwest's broad reading of the Ninth Circuit's decision, that alone does not resolve the problems *Auburn* has created. The balance Congress struck in section 253 will be derailed if local governments are forced to spend substantial resources simply to defend requirements that they believe are necessary to protect public rights-of-way. At best, only those communities that can afford the time and money to defend fundamental and long-standing tools used to

manage use of public rights-of-way will retain the authority that Congress intended to preserve for all local governments.

For example, since the *Auburn* decision, Qwest sued Portland, Oregon rather than agree to renew its franchise on the same terms under which it had operated for many years. Qwest claims, among other things, that the city (1) could no longer charge fees for right-of-way use that exceed Portland's costs, and (2) may not impose penalties for violations of city or state law. *See Qwest Corp. v. City of Portland*, Memorandum in Support of Motion for Summary Judgment, No. CV 01-1005 JE at 10 (D. Or. filed July 20, 2001) ("Qwest Memorandum").

Challenges are occurring both within and outside of the Ninth Circuit. Even non-telecommunications carriers are challenging local requirements in the wake of *Auburn*. For example, a company that does not provide telecommunications services has sued San Francisco, California, alleging that the imposition of penalties for failing to comply with the terms and conditions of excavation permits violates section 253. *Underground Constr. Co., Inc. v. City and County of San Francisco*, No. C-01-03707 MMC (N.D. Cal. filed Oct. 1, 2001).

The following examples demonstrate the confusion generated by the Ninth Circuit's decision, and the threat it creates for the public safety and welfare.

1. The Ninth Circuit held that requiring companies to submit "a lengthy and detailed application form, including maps, corporate policies, documentation of licenses, certain specified items" and other information requested by the city, in combination with other requirements, effectively prohibits service. Pet. App. 26a.

- Qwest claims in its suit against Portland, Oregon that the requirement to provide maps, in a format designated by the city, identifying the location of

Qwest's facilities in public streets is an unlawful prohibition of service. *See* Qwest Memorandum at 10. Qwest and its predecessors had, for decades, complied without objection to the requirement to provide maps.

- In Cheyenne, Wyoming, Qwest has objected to providing maps of its facilitities in the rights-of-way. Again, Qwest had previously complied with this requirement without objection.

2. The Ninth Circuit also found that requiring a carrier to "undergo an extensive application process," including providing information about its technical qualifications, did not constitute right-of-way management. Pet. App. 29a-30a. One of the ordinance provisions struck down by *Auburn* provides that in order to show that it is "technically qualified," a carrier must demonstrate "that it has experience or resources to ensure that work is to be performed adequately, and can respond to emergencies during and after construction is complete."[8]

Many jurisdictions have found that requiring facility maps and a demonstration of technical qualifications is critical to ensuring that public streets and sidewalks are safe, both for the entities that place facilities in those rights-of-way and for members of the general public who daily walk or drive on them. The requirements also are necessary to coordinate use of public rights-of-way and balance the competing interests of multiple users.

- In June and July, 1999, in Flower Mound, Texas, installation crews for a telecommunications company cut

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[8] *See* Tacoma Municipal Code, Chapter 16.02.1.1.4, Pet. App. 101a-102a.

through two water lines and three gas lines in the span of several weeks.[9]

- In July 1999 in Irving, Texas, a subcontractor doing construction for a telecommunications company hit one of the city's two main water supply lines and disrupted the community's water supply for a week.[10]
- In September 2000, a subcontractor for the same telecommunications company struck a water main in downtown Dallas, flooding several buildings in the heart of the city and forcing the evacuation of 800 workers and residents.[11]
- In December 1998 in St. Cloud, Minnesota, a construction crew for a communications company ruptured a gas line and caused a building to explode. Four people were killed, others were injured, and several buildings were destroyed. The National Transportation Safety Board (NTSB) found that a probable cause was lack of adequate procedures to prevent damage to nearby utilities.[12] In the six months after the incident, St. Cloud experienced additional incidents of ruptured or damaged gas lines as a result of construction in public rights-of-way. In response, St. Cloud adopted a safety plan that requires all companies placing facilities in public rights-of-way to satisfy specified training requirements. Other communities in Minnesota have adopted similar requirements.

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[9] Jason Lamers, *Latest Gas Line Break Adds to Woes*, Dallas Morning News Insert, Summer 1999 at 1A.

[10] Rachel Horton, *City Urges Water Conservation After Water Line Slashed*, Irving News, July 11-14, 1999 at A1.

[11] Ian McCann & Steve Quinn, *Water Mains Flood Downtown*, Dallas Morning News, Sept. 5, 2000 at A1.

[12] NTSB, *Pipeline Accident Report*, NTSB Number PAR-00/01. The report is available at www.ntsb.gov/Publictn/2000/PARA0001.htm.

The increased use of city streets by telecommunications providers increases the risk that someone digging in the streets will disrupt existing facilities. Amici believe that requiring maps showing where facilities are located, and requiring assurances that the construction will be performed in a safe and reliable manner or requesting information about past construction problems are consistent with prudent right-of-way management. In any event, such requirements cannot reasonably be found to effectively prohibit the provision of service.

The language of the *Auburn* decision is throwing these and other local requirements into question. Clarifying the scope of local authority under section 253 will reduce the need for communities to forego requirements that they believe are necessary to ensure safe streets, or to defend these policies in court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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DEC 10 2001

No. 01-596

IN THE

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON, *et al.*,
Petitioners,

v.

QWEST CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in ruling that various provisions in petitioners' municipal franchise ordinances, taken in combination and as applied to respondent's telecommunications operations, are preempted by 47 U.S.C. § 253.

RULE 29.6 STATEMENT

Respondent Qwest Corporation is a wholly owned subsidiary of Qwest Services Corporation, which is a wholly owned subsidiary of Qwest Communications International Inc. No publicly held company owns 10% or more of the stock of Qwest Communications International Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES iv

RESPONDENT'S BRIEF IN OPPOSITION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 6

I. THE INDEPENDENTLY PREEMPTIVE EFFECT OF STATE LAW MAKES THIS CASE A POOR CANDIDATE FOR CERTIORARI. 6

II. THE PETITION PRESENTS NO SPLIT OF AUTHORITY WARRANTING CERTIORARI. 9

III. THE COURT OF APPEALS DID NOT ERR IN RESOLVING THE ISSUES BEFORE IT. 13

CONCLUSION 17

TABLE OF AUTHORITIES

Page(s)

CASES

AT&T v. Iowa Utils. Bd., 525 U.S. 366 (1999) 12, 15, 16

Bell Atlantic-Maryland, Inc. v. Prince George's County, 155 F. Supp. 2d 465 (D. Md. 2001) 9

BellSouth Telecommunications, Inc. v. Town of Palm Beach, 252 F.3d 1169 (11th Cir. 2001) 9, 10

Braxton v. United States, 500 U.S. 344 (1991) 13

CSX Trans., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) 15

Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co., 132 F.3d 526 (9th Cir. 1997) 13, 14

General Telephone Co. v. Bothell, 716 P.2d 879 (Wash. 1986) 9

Lambrix v. Singleton, 520 U.S. 518 (1997) 7

Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355 (1987) 15

New Jersey Payphone Ass'n, Inc. v. Town of West New York, 130 F. Supp. 2d 631 (D.N.J. 2001) 16

Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev't Comm'n, 461 U.S. 190 (1983) 15

Singleton v. Wulff, 428 U.S. 106 (1976) 14

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000) 10, 11, 12

United States v. Causby, 328 U.S. 256 (1946) 17

Wharf (Holdings) Ltd. v. United Int'l Holdings Inc., 121 S. Ct. 1776 (2001) 7

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 1
47 U.S.C. § 251(d)(2) 15
47 U.S.C. § 253(a) ..... *passim*
47 U.S.C. § 253(b) 4
47 U.S.C. § 253(c) ..... *passim*
47 U.S.C. § 253(d) 4
47 U.S.C. § 332(c)(3) 7
ESSB 6676 ..... 3, 4, 8
RCW § 35.21.860(1) 11
RCW § 35.21.870 11
RCW § 35.99.040(1)(a) 8
RCW § 35.99.040(2)(c) 8
RCW § 80.36.100 9
RCW § 80.36.110 9
RCW § 80.36.130 9
RCW § 80.36.180 8

TABLE OF AUTHORITIES
(continued)

Page(s)

REGULATIONS AND EXECUTIVE MATERIALS

In Re TCI Cablevision, 12 FCC Rcd. 21,396 (1997) 15, 16

In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, 14 FCC Rcd. 12,673 (1999) 7, 12, 13

OTHER AUTHORITIES

Fed. R. Civ. P. 12(c) 13

Sup. Ct. Rule 10 ..... 9, 12, 13, 14

Robert L. Stern, et al., *Supreme Court Practice* (7th ed. 1993) 7

IN THE

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CITY OF TACOMA, WASHINGTON, *et al.*,
Petitioners,

v.

QWEST CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

This case concerns the validity, under state and federal law, of numerous different municipal ordinances that regulate the access of telecommunications providers to local rights-of-way in the State of Washington. The court of appeals held that state law preempts most applications of the challenged ordinances, Pet. App. 21a-22a, and that the federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (Telecom Act), preempts the remainder, 23a-34a. This petition followed.

The petition should be denied. First, in holdings that petitioners do not mention, the court of appeals found that state law preempts most applications of the challenged ordinances to respondent Qwest Corporation. That independent state law holding would make this case an

exceptionally poor vehicle for this Court's review of any issue arising under section 253. In any event, the decision below was correct; it creates no circuit conflict warranting certiorari; and at this point the Court's review would be premature, given the pending administrative proceeding initiated by the Federal Communications Commission ("FCC") to address the set of issues presented here.

STATEMENT OF THE CASE

1. Qwest is a nationwide provider of telecommunications services and is the incumbent local exchange carrier in 14 western States, including Washington. Petitioners City of Tacoma, City of Auburn, and City of Des Moines are municipalities within Qwest's service region. To serve its customers within those municipalities, Qwest uses public rights-of-way, mostly for the deployment of its wireline facilities, but also, to a lesser extent, for the deployment of its wireless network as well.

Petitioners have enacted various ordinances requiring Qwest and other telecommunications companies to obtain franchises before using their public rights-of-way. These ordinances impose a wide range of regulatory obligations on providers seeking a franchise, and they consume almost 150 pages of the Appendix to the petition. *See* Pet. App. 53a-107a, 157a-181a, 210a-247a, 276a-295a, 327a-337a. Qwest has not obtained a franchise pursuant to any of the ordinances.

2. This litigation began when petitioners and numerous other Washington cities filed suit in state court seeking a declaration that they had no obligation to reimburse Qwest for the costs of equipment relocations necessitated by the cities' right-of-way improvements. Pet. 6. Qwest removed the case to federal court on diversity grounds and filed counterclaims seeking a declaration that state and federal law preempts the franchise ordinances. Pet. App. 5a.

The district court granted summary judgment for the plaintiff cities on the relocation costs issue. The court

separately dismissed as unripe Qwest's counterclaim challenging the franchise ordinances because petitioners had not yet attempted to enforce them against Qwest. Pet. App. 45a.

3. The court of appeals affirmed the judgment for the plaintiffs on the issue of relocation costs, but reversed the dismissal of Qwest's counterclaims on the preemption issue. Only the latter issue is before this Court.

a. The court of appeals first rejected the district court's conclusion that the counterclaims are unripe. As to the constitutional component of the ripeness inquiry, it held that Qwest faces "a realistic danger of sustaining a direct injury" from the franchise ordinances. Pet. App. 18a (internal quotation marks omitted). As to the two-part "prudential component" of ripeness, the court first held that the issue is "fit for judicial decision" because the claim presents "a pure question of law"— whether the ordinances are preempted by state and federal law. *Id.* at 18a. The court explained that "[n]o further factual record would narrow or clarify that issue," in that "there is no factual dispute about the activity conducted by Qwest, nor the applicability of the ordinances to its activity." *Id.* at 19a. Second, the court determined, postponing review would impose on Qwest "an immediate and significant change in [Qwest's] conduct of [its] affairs with serious penalties attached to noncompliance." *Id.* at 20a.

b. Turning then to the merits of Qwest's state and federal preemption arguments, the court of appeals held that the franchise ordinances are preempted as a matter of law.

The court first considered the preemptive effect of a recently enacted state law, ESSB 6676. That law establishes a statewide "system by which cities may grant . . . franchises" to telecommunications providers, "significantly alter[ing] the ability of municipalities to regulate telecommunications utilities." Pet. App. 21a. The court held first that, as a matter of state law, ESSB 6676 "clearly conflicts with," and thus

preempts, petitioners' ordinances "insofar as they purport to require [Qwest] to obtain a franchise for its wireline facilities," *id.* at 22a. As a result, the court held, "the relief sought in Qwest's counterclaim – so far as it deals with wireline facilities – has been granted by [state] statute." *Id.*

Because Washington state courts had not yet interpreted the effect of the complex state statute as to wireless facilities, the court of appeals declined to reach the preemptive effect of that statute on Qwest's wireless operations, reasoning that "a state court is better equipped to first interpret ESSB 6676 and its relationship with other state laws." Pet. App. 23a. The court instead turned to the preemptive effect of the federal Telecom Act.

Section 253(a) of the Communications Act of 1934, as amended by the Telecom Act, generally preempts all state or local laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a). Subsections (b) and (c), in turn, are "safe harbors" that exempt certain legal requirements from the preemptive force of section 253(a). Subsection (c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). Subsection (d) authorizes the FCC, after notice and comment, to preempt any state or local law "that violates subsection (a) or (b)." 47 U.S.C. § 253(d).

The court of appeals held that petitioners' ordinances "include several features that, in combination, 'have the effect of prohibiting' Qwest and other companies from providing

telecommunications services" in violation of subsection (a). Pet. App. 26a. The features at issue include, among others, restrictions on the transferability of a telecommunications carrier's ownership, arbitrarily cumbersome application requirements, and various "discretionary factors that have nothing to do with the management or use of the right-of-way." *Id.* 26(a).

Having determined that, in the aggregate, these ordinances violate the threshold prohibition of section 253(a), the court next considered whether they fall within the scope of the section 253(c) savings clause. The court first observed that, as the FCC has confirmed, the "right-of-way management" preserved under section 253(c) "means control over *the right-of-way itself*, not control over *companies* with facilities in the right-of-way." Pet. App. 27a-28a (emphasis added). The court then determined that petitioners' ordinances regulate "not merely the rights of way," but also "the telecommunications companies themselves," and therefore fall outside the scope of this savings clause. *Id.* at 29a.

The court identified four primary features of the ordinances that "most seriously violate § 253(c)." *First*, the ordinances compel providers to undergo a lengthy, dilatory application process that includes filing extensive information about their financial soundness, technical and legal qualifications, and current and planned services – *i.e.*, information that relates only to the provision of services and not to management of the rights-of-way. Pet. App. 29a-30a. *Second*, the ordinances regulate the transfer of a provider's stock, even though stock transfers have no general connection to any right-of-way management issue. *Id.* at 30a-31a. *Third*, several of the cities (including two of the petitioners) require that franchisees give those cities the best available rates and terms on telecommunications services the franchisees offer, and all three petitioner cities require franchisees to provide excess telecommunications capacity for the cities' own use.

Those requirements, the court observed, are directed at regulating service and not rights-of-way. *Id.* 31a.

Fourth, "and perhaps most problematic," the court concluded, "the ordinances grant [petitioners] unfettered discretion to insist on unspecified franchise terms and to grant, deny, or revoke a franchise based on unnamed factors," Pet. App. 32a, that are not limited to factors relevant to the impact of the franchisee's proposed use of the city's rights-of-way.[1] Because the court held that the ordinances fall within the scope of the section 253(a) prohibition but outside the scope of the section 253(c) savings clause, it concluded that they are preempted by section 253 as a whole.

REASONS FOR DENYING THE WRIT

The petition should be denied, first, because state law complications would make this case an inappropriate vehicle for certiorari; second, because the decision below is correct and creates no circuit conflict warranting this Court's review; and, third, because this Court's review would be premature in any event given the FCC's pending notice of inquiry on this general set of issues.

I. THE INDEPENDENTLY PREEMPTIVE EFFECT OF STATE LAW MAKES THIS CASE A POOR CANDIDATE FOR CERTIORARI

As a threshold matter, even if petitioners' claims otherwise warranted certiorari, which they do not, this case would present a poor vehicle for this Court's review of any federal question relating to section 253. In a holding petitioners do not mention, let alone challenge, the court of appeals held that

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[1] Although those four features are "the aspects of the ordinances that most seriously violate § 253(c)," the court added that still others "are objectionable as well," Pet. App. 32a-33a, citing as examples public hearing requirements, negotiation requirements, and franchise fees based on factors other than costs relating to the use of the right-of-way, *id.* at 33a n.19, all of which also are unrelated to management of the right-of-way itself.

state law preempts petitioners' ordinances as they apply to *all* of Qwest's wireline operations. *See* Pet. App. 20a-22a. The court then indicated that a variety of different state law provisions might also preempt those ordinances as they apply to Qwest's wireless operations as well. *See id.* at 22a-23a & n.9. Because it is this Court's settled practice not to review a lower court's determinations of state law, this Court's review of any of the questions presented here would be confined, at the most, to the preemptive effect of federal law on a municipality's regulation of *wireless services*. *See Wharf (Holdings) Ltd. v. United Int'l Holdings Inc.*, 121 S. Ct. 1776, 1781-82 (2001); *see also Lambrix v. Singleton*, 520 U.S. 518, 522-23 (1997); Robert L. Stern, et al., *Supreme Court Practice* 172-73 (7th ed. 1993).

That limitation would, at best, substantially distort this Court's review of petitioners' arguments under section 253. The great majority of right-of-way disputes arising under that provision concern municipal restrictions on the deployment of *wireline* facilities. In contrast, *wireless* operations place different and far fewer demands on rights-of-way,[2] and they are subject to special federal protections against certain state and local restrictions.[3] Thus, if this Court were otherwise inclined to review the relationship between municipal right-of-way

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[2] *See generally In the Matter of Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, WT Docket No. 99-217, 14 FCC Rcd. 12,673, 12,712 ¶ 71 (1999) ("*FCC Notice*") ("wireless carriers typically impose far less burden on public rights-of-way than carriers that offer service primarily by means of wireline telephony").

[3] For example, 47 U.S.C. § 332(c)(3) provides that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service." As the FCC has explained, "a State or local rights-of-way management procedure or requirement, as applied to [mobile service] providers, is permissible under section 332(c)(3) if it constitutes regulation of terms and conditions *other than rates or entry*. Any requirement that functions as an entry regulation, however, is *not permissible as applied to [mobile service] providers*." *FCC Notice*, 14 FCC Rcd. at 12,714 ¶ 74 (emphasis added).

regulation and section 253, it should grant certiorari to review a typical case, in which the Court's review would focus on wireline applications, rather than this case, in which the Court's review would be limited to wireless applications and would raise numerous state and federal law complications.

Finally, as the court of appeals observed, various provisions of Washington law may independently preempt the franchise ordinances *even as to Qwest's wireless operations.* Pet. App. 22a. For example, a separate provision of ESSB 6676 prohibits municipalities from enacting regulations "specifically relating to the use of the right of way by a service provider" if they "[i]mpose requirements that regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law." RCW § 35.99.040(1)(a). Many of the challenged ordinances plainly regulate Qwest's "business operations," as prohibited by ESSB 6676.[4] Similarly, "some provisions of the ordinances might be preempted by state statutes regulating in the same subject area" (Pet. App. 22a n.9), such as the state law provision, discussed below, that preempts petitioners' ordinances imposing non-cost-based franchise fees, which are the subject of petitioners' third question presented. *See* pp. 10-11, *infra*.[5] For all of these

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[4] Although *this* provision of ESSB 6676 provides its own "safe harbor" for certain local laws that "do not otherwise . . . "[v]iolate section 253 of the [Telecom Act]," RCW § 35.99.040(2)(c), that safe harbor is available only for laws regulating "the placement of facilities," *id.* § 35.99.040(2). The court of appeals already has found that petitioners' regulatory ordinances contain a host of provisions that regulate *more* than the mere "placement of facilities." *See* Pet. App. 29a-33a.

[5] As a further example, two of petitioners' ordinances require providing those municipalities "the best available rates and terms." Pet. App. 31a. But RCW § 80.36.180 prohibits telecommunications providers in most instances from receiving from any customer "a greater or less compensation for any service rendered" than it receives from any other customer for similar services under similar conditions. And state law also precludes a municipality from enacting any ordinance requiring a telecommunications provider to offer a rate different from the rate filed by the provider with the Washington Utilities and Transportation Commission (the "WUTC"). *See*

reasons, an opinion by this Court concerning the preemptive effect of the federal Telecomm Act on petitioners' ordinances may very well have no real-world effect on the concrete matter at stake between the parties. It would be, in effect, a wholly advisory opinion. *Cf. Bell Atlantic-Maryland, Inc. v. Prince George's County*, 155 F. Supp. 2d 465, 478 (D. Md. 2001) (holding ordinance vacated under state law after court of appeals vacated district court's prior order finding same ordinance preempted under section 253).[6]

II. THE PETITION PRESENTS NO SPLIT OF AUTHORITY WARRANTING CERTIORARI.

Despite petitioners' arguments to the contrary, the decision below presents no circuit conflict warranting this Court's review. *Cf.* Sup. Ct. Rule 10.

Petitioners first claim (Pet. 17-21) that, in declining to require a carrier-specific factual inquiry under section 253(a), the decision below conflicts with the Eleventh Circuit's interpretation of section 253 in *BellSouth Telecommunications, Inc. v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001). That is incorrect. As relevant here, the *BellSouth* court held that the district court in that case had erred in holding that certain municipal ordinances were preempted by section 253(c) itself

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General Telephone Co. v. Bothell, 716 P.2d 879, 883 (Wash. 1986). Providers are required to file their rates with the WUTC, RCW §§ 80.36.100, 80.36.110, and to charge exactly the rate filed with and approved by the WUTC, RCW § 80.36.130. As a result, a rate approved by the WUTC "has the force and effect of law," *Bothell*, 716 P.2d at 883, which preempts any local ordinance that "conflicts" with the filed rate, *id.* at 884. Those state-law provisions invalidate the "most favorable community" rate provisions in petitioners' ordinances.

[6] Although Qwest believes that the court of appeals correctly rejected the threshold ripeness and standing issues advanced by petitioners below (*see* Pet. App. 15a-20a & n.6), this Court's agreement on that point would be a non-waivable jurisdictional prerequisite to any further review of this case on the merits.

without first determining that the ordinances violated the primary prohibition of section 253(a). *See id.* at 1191-92 & n.15. The Eleventh Circuit remanded "for further proceedings," but only "to determine whether the sections of the ordinances violate subsection (a)." *Id.* at 1191. The Eleventh Circuit nowhere required the district court to conduct an evidentiary hearing or make an individualized factual determination; it objected not to the absence of a factual determination under section 253(a), but to the absence of *any* section 253(a) inquiry at all. Here, of course, the court of appeals did conduct precisely such an inquiry, and it determined that the requirements of the challenged ordinances do violate section 253(a). Pet App. 25a. *BellSouth* requires nothing more, and, as discussed below, the carrier-specific factual inquiry that petitioners seek is neither necessary nor appropriate.

There is similarly no merit to petitioners' suggestion (Pet. 19) that, by declining to order such an inquiry, the decision below "appears to be at odds" with the Sixth Circuit's decision in *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (2000). In *Dearborn*, the complaining carrier had contended, in effect, that *any* franchise requirement, no matter how small, automatically constitutes a "prohibition" for purposes of section 253(a); it reasoned that, if such a requirement goes unmet, a carrier is prohibited from providing service. *Id.* at 624. The Sixth Circuit rejected this argument as "sophistry." *Id.* Nothing in the decision below is to the contrary. Expressly acknowledging *Dearborn*, the court of appeals explained that preemption of these ordinances arises not from "the mere franchise requirement, or the possibility of denial alone," but from the burdensome substance of the numerous franchise conditions. Pet. App. 27a n.11.

Petitioners also contend that, in two references to non-cost-based fees (Pet. App. 26a, 33a n.19), the decision below creates a second conflict with *Dearborn*. The Sixth Circuit there upheld, as "fair and reasonable compensation" under section

253(c), what appears to have been one such fee. As an initial matter, while the court below included non-cost-based fees within the set of provisions invalidated by section 253, it also noted that state law might well have independent preemptive force. The court was right. State law preempts the fee ordinances at issue in this case, and this Court's review of any federal preemption issue with respect to those fees would thus be entirely academic. *See* RCW § 35.21.860(1) (prohibiting municipalities, with enumerated exceptions, from imposing any "franchise fee" upon a telephone service provider "for the use of the right of way") (cited in Pet. App. 22a n.9); *see also* pp. 6-9, *supra*.[7]

In any event, there is no conflict between *Dearborn* and the decision below that could justify certiorari. The question in *Dearborn* was whether the specific fee at issue there constituted "fair and reasonable compensation" for purposes of subsection (c). The district court in that case had answered in the affirmative, reasoning, among other things, that the fee was commensurate with "the amount of use contemplated (twenty-seven miles)" and was supported by "the fact that [the carrier] had agreed in earlier negotiations to a fee almost identical to what it was now challenging as unfair." *Id.* at 625. The Sixth Circuit upheld the district court's reasoning as "thorough" and "sound." *Id.*

The petition alleges no facts similar to those presented in *Dearborn*, and the two cases are readily distinguishable. In this case, the court of appeals held that, "[t]aken together" with various other requirements, such fees violate subsection (a) without being saved by subsection (c). Pet. App. 26a; *see also id.*

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[7] State law does allow municipalities to impose a six-percent "gross receipts *tax*" on telephone companies, RCW § 35.21.870 (emphasis added); *see* Pet. App. 26a n.10, but such taxes, as distinguished from "non-tax fees" (*id.*), are not at issue here. Qwest's challenge below was limited to non-cost-based fees for use of the rights-of-way. Qwest did not challenge the separate six-percent gross receipts tax. That exaction was a tax, not a fee for use of the rights-of-way. *See* US WEST Ct. App. Br. 23 n.29.

at 25a (challenged ordinances "include several features that, in combination," violate subsection (a)). The *Dearborn* court addressed a separate issue: whether the specific fee at issue there was preempted by subsection (c) *itself*, on the theory that Congress created a private right of action to challenge a fee ordinance that "violat[es]" *that* subsection even if the ordinance does not "rise to the level" of violating subsection (a). 206 F.3d at 624. The court below did not address that issue. Rather, when it turned to subsection (c), it included petitioners' non-cost-based fees within a footnote listing miscellaneous "objectionable" requirements. Pet. App. 32a-33a & n.19. Nothing in that footnote creates a circuit conflict warranting this Court's review.[8]

Finally, even if there *were* a circuit conflict on the proper application of section 253 in this setting, this Court should permit the FCC to address it in a pending administrative proceeding relating to this very set of issues. Pursuant to its authority to issue general rules interpreting the provisions of the Communications Act, *see AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999), the FCC has begun a proceeding to consider, among other things, the proper scope of right-of-way ordinances in light of the restrictions of section 253. *See FCC Notice*, 14 FCC Rcd. at 12,712 ¶ 70. The FCC's *Notice* in that proceeding underscores the Commission's "concern that local regulation should not reach beyond traditional rights-of-way matters and . . . aspire[] to govern the relationships among telecommunications providers, or the rates, terms and conditions under which telecommunications service is offered to the public," as well as the Commission's further "concern

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[8] Petitioners allege disagreement among various district courts concerning certain issues arising under § 253. Pet. 26 & nn.9-10. Such a conflict, of course, is not a cognizable basis for certiorari. *Cf.* Sup. Ct. Rule 10(a). Among other considerations, this Court normally benefits from deferring review until a set of issues has received full analysis in the courts of appeals. The development of further appellate analysis would be particularly useful where, as with § 253, the issues arise in a number of different factual settings.

about requirements imposed on carriers that use the public rights-of-way that are unrelated to their rights-of-way usage." *Id.* at 12,714 ¶76 (internal quotation marks and brackets omitted). At this stage in the development of the case law, it would be appropriate for the Court to defer any review of these policy-laden issues until after the FCC has had an opportunity to resolve them. *Cf. Braxton v. United States*, 500 U.S. 344, 348-49 (1991).

III. THE COURT OF APPEALS DID NOT ERR IN RESOLVING THE ISSUES BEFORE IT.

On the merits, petitioners' argument reduces to the claim that the court of appeals erred on three separate grounds, relating to appellate procedure, section 253(a), and section 253(c) respectively. Of course, mere error-correction is customarily not an appropriate basis for seeking certiorari. Sup. Ct. Rule 10. And, in any event, there is no error to correct.

1. Petitioners' procedural claim (which appears as the second question presented) asserts that the court of appeals erred by "misinterpreting ... federal rules of procedure" and, in particular, the standard for evaluating a motion for judgment on the pleadings under Federal Rule 12(c). *See* Pet. 13. Following circuit precedent, *see Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co.*, 132 F.3d 526, 529 (9th Cir. 1997), the court of appeals framed the standard, in passing, as "[w]hether, on the facts alleged, Qwest is entitled to judgment as a matter of law." Pet. App. 23a. Petitioners apparently believe that, in referring to "the facts alleged," the court was referring to the facts alleged *by Qwest* rather than those alleged by petitioners. *See* Pet. 21-22.

There is no basis for that assumption. Indeed, the court's citation of *Enron Oil* suggests just the opposite— that judgment may be entered under Rule 12(c) only when "the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to

judgment as a matter of law." *See Enron Oil*, 132 F.3d at 529 (internal quotation marks omitted). Applying that rule, which it did not purport to alter, the court below indicated that only two general "facts" are "material" here—"the activity conducted by Qwest," and "the applicability of the ordinances to its activity"—and that each is undisputed. Pet. App. 19a. The court's entry of judgment under Rule 12(c) was thus appropriate and unexceptional.[9]

2. Petitioners separately contend that the court of appeals erred in resolving the threshold preemption inquiry under section 253(a) as a matter of law on the face of the municipal ordinances. Pet. 22-23. In petitioners' view, that provision requires a highly fact-specific inquiry into the effect of such an ordinance on the *particular* telecommunications carrier alleging preemption.

That proposition, for which the petition cites no genuine authority (*see* pp. 9-10, *supra*), is incorrect. Far from requiring a carrier-specific inquiry, section 253(a) expressly precludes, with respect to all carriers, all state or local ordinances that "prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service" (emphasis added). Petitioners' contrary, countertextual interpretation would threaten the very discrimination that section 253 is designed to preclude, because it would make various municipal restrictions applicable to some carriers but

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[9] Citing *Singleton v. Wulff*, 428 U.S. 106 (1976), petitioners assert that the court committed procedural error in resolving the merits of the counterclaims rather than remanding for the district court to address those claims on the merits in the first instance. Pet. 23. As petitioners themselves concede, however, "*Singleton* recognized that '[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeal,' and 'announce[d] no general rule.'" Pet. 24 (quoting *Singleton*, 428 U.S. at 121). Here, following *Singleton*, the court properly exercised that discretion to decide the merits of the counterclaims. Pet. 19a. Petitioners' disagreement with that factbound application of "a properly stated rule of law" is not a proper ground for seeking certiorari. Sup. Ct. Rule. 10.

not others on the basis of their individual competitive circumstances. It would also subject carriers to dilatory, fact-intensive litigation before obtaining judicial relief from franchise requirements that would delay the market-sensitive deployment of telecommunications facilities.

There is no merit to petitioners' further contention (Pet. 14-16) that the court of appeals' approach to this issue "appears inconsistent with" this Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999). As an initial matter, *Iowa Utilities Board* addresses *different statutory language* located in a *different section* of the Telecom Act (47 U.S.C. § 251(d)(2)) governing an entirely *different aspect* of telecommunications regulation: a competing carrier's access to an incumbent telephone company's network elements at cost-based rates. Presumably for those reasons, petitioners did not even cite *Iowa Utilities Board* in their briefs below, much less contend that the decision compels a ruling in their favor. If anything, *Iowa Utilities Board* cuts against petitioners' argument for a carrier-specific inquiry, because the "impairment" analysis required under section 251(d)(2) is conducted on an industry-wide, rather than carrier-specific, basis. More generally, federal preemption disputes are typically decided on general legal principles rather than on the basis of case-specific factual inquiries, and there is no basis for a different approach to section 253.[10]

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[10] *See, e.g., Pacific Gas & Elec. Co. v. State Energy Resources Cons. & Dev't Comm'n*, 461 U.S. 190, 201 (1983) ("The question of preemption is predominantly legal."); *see also CSX Trans., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993) (invalidating fact-specific state claim as preempted by general federal legal standard); *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1987) ("The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law."). There is no merit to petitioners' contention that the decision below conflicts with the FCC's order in *In Re TCI Cablevision*, 12 FCC Rcd. 21,396 (1997). Although the order states that a party must submit "credible and probative evidence that the challenged requirement falls within the proscription of § 253(a)" in order to trigger action by the agency, the

3. The final question on which petitioners seek review is whether the court of appeals erred by citing, within the list of problematic conditions on the use of municipal rights of way, particular franchise fees that would entitle petitioners to receive well more than the costs that such use imposes on the rights-of-way. *See* Pet. App. 26a, 33a & n.19. A fee that does more than make a municipality whole, such as a fee based on a carrier's gross revenues or some other non-cost-based factor, is not "fair and reasonable compensation . . . for *use* of public rights-of-way." 47 U.S.C. § 253(c) (emphasis added); *see New Jersey Payphone Ass'n, Inc. v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001). A fee based on the putative "fair market value" of municipal rights-of-way beyond "reimbursement of costs" (Pet. 28) is similarly an exaction for the supposed *value*, rather than fair and reasonable compensation for the *use*, of these bottleneck assets. More generally, the imposition of non-cost-based fees would necessarily chill the deployment of new telecommunications facilities. That effect would be profoundly inconsistent with the overarching purpose of the Telecom Act, which is to help the telecommunications industry make the transition from regulated monopoly to full competition. *See Iowa Utils. Bd.*, 525 U.S. at 370.[11]

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evidence at issue involved the nature of the requirements, not the particular circumstances of individual carriers. *Id.* at 21,440 ¶ 101.

[11] As the FCC has indicated in recent litigation, the imposition of revenue-based fees is difficult to square with the requirement that franchise fees be "competitively neutral and nondiscriminatory," and for that reason too such fees are "problematic under section 253(c)." Br. of FCC and United States as Amici Curiae, at 14 n.7, filed in *TCG New York, Inc. v. City of White Plains*, Nos. 01-7213 & 01-7255 (2d Cir.). That is so because, even if a revenue-based fee were uniformly applied, it "might well have no relationship to either the extent of each carrier's use or the costs it imposed on the municipality. It therefore could be inconsistent with the competitive neutrality requirement of 253(c)." *Id.* For example, under a gross-revenue-based fee system, if company A has competitive efficiencies that allow it to obtain higher gross revenues than company B from the same right-of-way

Finally, petitioners rely, by analogy, on "just compensation" principles in the Takings Clause context as a basis for imposing above-cost assessments. Pet. 27-28. Of course, petitioners present no claim for just compensation. But even if Takings Clause principles were somehow applicable here, they would undermine petitioners' position. As this Court has explained, "[i]t is the owner's loss, not the taker's gain, which is the measure" for payment due in the Takings Clause context. *United States v. Causby*, 328 U.S. 256, 261 (1946).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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access, company A will also suffer a higher fee. A fee that is charged *because of* a company's competitive advantages cannot be described as "competitively neutral."

Supreme Court, U.S.
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No. 01-596

In The

Supreme Court of the United States

CITY OF TACOMA, WASHINGTON, ET AL.,
PETITIONERS,

v.

QWEST CORPORATION, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

Page

I. THE DECISION PRESENTS CONFLICTS WARRANTING REVIEW.....2

II. NEITHER STATE LAW NOR PENDING FCC PROCEEDINGS MILITATE AGAINST CERTIORARI.....6

III. THE COURT OF APPEALS ERRED ON IMPORTANT FEDERAL ISSUES.....8

TABLE OF AUTHORITIES

CASES

Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990).....8

Ashwander v. TVA, 297 U.S. 288 (1936).....7

AT&T v. Iowa Utilities Board, 525 U.S. 366 (1999).....2, 3, 9

Bell Atlantic v. Prince George's County, 212 F.3d 863 (4th Cir. 2000).....7

BellSouth Telecommunications v. Town of Palm Beach, 252 F.3d 1169(11th Cir. 2001).....3, 4, 7, 9

Brown v. Hotel Restaurant Employees & Bartenders Int'l Union Local 54, 468 U.S. 491 (1984).....3

Cablevision of Boston v. Public Improvement Comm'n, 184 F.3d 88 (1st Cir. 1999).....3

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987).....3

Director, Office of Workers' Compensation v. Newport News Shipbuilding, 514 U.S. 122 (1995)..... 10

Omnipoint Communications v. Newtown Township, 219 F.3d 240 (3rd Cir.2000).....3

Puerto Rico Tele. Co. v. Telecommunications Regulatory Board, 189 F.3d 1 (1st Cir. 1999).....3

Rodriguez v. U.S., 480 U.S. 522 (1987).....10

Singleton v. Wulff, 428 U.S. 106 (1976).....4, 8, 9

TCG Detroit v. City of Dearborn, 206 F.3d 618 (6th Cir. 2000).....4, 5

360° Communications v. Board of Supervisors of Albemarle County, 211 F.3d 79 (4th Cir. 2000).....3

Town of Amherst v. Omnipoint Communications, 173 F.3d 9 (1st Cir. 1999).....3

U.S. v. Causby, 328 U.S. 256 (1946).....10

U.S. West Communications, Inc. v. Arizona Corp. Comm'n, 34 P.3d 351, 2001 WL 1429373 (Az. Sup. Ct. Nov. 15, 2001).....6

STATUTES

Communications Act of 1934, 47 U.S.C. §151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).....2

47 U.S.C. §202(a).....9
47 U.S.C. §251.....2, 3
47 U.S.C. §252.....2
47 U.S.C. §253.....*passim*

47 U.S.C. §332(c)(7)(B)(i)(II).....3

RCW § 35.99.040(2)(c).....7

RULES AND REGULATIONS

Fed.R.Civ.P. 12(c).....2, 8

Sup. Ct. R. 10(a).....6, 8

ADMINISTRATIVE AGENCY DECISIONS

Implementation of Local Competition Provisions, 11 FCC Rcd. 14171 (1996) 3

Pittencrieff Communications, 13 FCC Rcd. 1735 (1997), *pet. for review denied sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999).....5

Promotion of Competitive Networks, Notice of Inquiry, 14 FCC Rcd. 12673 (1999).....7

TCI Cablevision, 12 FCC Rcd. 21396 (1997) 5

In The

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No. 01-596

CITY OF TACOMA, WASHINGTON, ET AL.,
PETITIONERS,

v.

QWEST CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent does not appear to dispute the importance of the questions presented, at least those relating to the proper interpretation of 47 U.S.C. §253(a) and (c).[1] *See* Br. in Opp. at 7-8, 12, 14-15 & 16. Instead, Respondent claims that review is inappropriate for various other reasons.

As explained below, however, Respondents' reasons wilt under scrutiny and serve only to distract attention from the important issues clearly and squarely presented: According to the court of appeals, in determining whether state or local requirements "have the effect of prohibiting the ability of any entity" to provide service under 47 U.S.C.

[1] *Amici* further amplify the critical importance of the questions presented. Brief of Amici Curiae Local Governments In Support of Petitioners (filed Dec. 10, 2001) ("Amicus Br.").

§253(a), facts about the actual effect of the challenged requirement on any entity's ability to provide service *do not matter*. Instead, naked policy preferences and factual speculation *dehors* the record about the "costly and burdensome" nature of the requirements (App. 19a) may be substituted for facts, inverting Fed. R. Civ. P. 12(c) and, in the process, mutating the plain language of §253(a) into an open invitation to judicial legislation.

The court of appeals' decision represents an unprecedented and statutorily unwarranted usurpation of state and local legislative authority, unhinged from the specific preemption language Congress chose in §253(a). The important federal statutory and federalism issues presented by the decision below warrant this Court's review.

I. THE DECISION PRESENTS CONFLICTS WARRANTING REVIEW.

1. Respondent unsuccessfully tries to sidestep the inconsistency between the decision below and this Court's construction of strikingly similar language in *AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999). Br. in Opp. at 15. Contrary to Respondent's suggestion, 47 U.S.C. §§251-253 are of a piece: Together, they are the "central provisions" of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)("1996 Act"), designed to promote competition in local telecommunications markets, with §§251 and 252 requiring incumbent local exchange carriers ("ILECs") to open their bottleneck networks to competitive local exchange carriers ("CLECs"), while §253 loosens state and local requirements that prohibit CLECs' ability to enter

the market and compete with ILECs.[2] Moreover, Respondent offers no rational linguistic explanation (nor is any apparent) how, as this Court held in *Iowa Utilities Board*, §251 (d)(2)(B)'s "*impair the ability*" to provide service depends on the facts while, according to the court of appeals, §253(a)'s "*prohibiting the ability*" to provide service does not.

Respondent's companion assertion that preemption is "typically" legal and does not depend on facts (Br. in Opp. at 15) is simply wrong. Preemption often turns on facts concerning the actual effect of the challenged state or local law.[3] That is especially true where, as here, the language Congress has chosen to define the scope of preemption -- whether a local requirement "ha[s] the effect of prohibiting the ability" to provide service -- cries out for facts.

2. Respondent seeks to belittle the conflict between the decision below and *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001), by claiming that the Eleventh Circuit's remand to the district court to conduct a "§253(a) inquiry"

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[2] *Cablevision of Boston v. Public Improvement Comm'n*, 184 F.3d 88, 97 (1st Cir. 1999); *Puerto Rico Tele. Co. v. Telecommunications Regulatory Board*, 189 F.3d 1, 7-8 (1st Cir. 1999); *Implementation of Local Competition Provisions*, 11 FCC Rcd. 14171, 14177-78(¶14)(1996). *Accord Iowa Utilities Board*, 525 U.S. at 371-72; *id.* at 405 (Thomas, J., concurring in part and dissenting in part) & 416 (Breyer, J., concurring in part and dissenting in part).

[3] *See, e.g., Brown v. Hotel Restaurant Employees & Bartenders Int'l Union Local 54*, 468 U.S. 491, 511 (1984); *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1987) (cited in Amicus Br. at 7 & 11). *See also Omnipoint Communications v. Newtown Township*, 219 F.3d 240, 244 (3rd Cir. 2000) (whether local zoning decision is preempted because it "prohibit[s] or ha[s] the effect of prohibiting" wireless service under 47 U.S.C. §332(c)(7)(B)(i) (II) depends on facts). *Accord 360° Communications v. Board of Supervisors of Albemarle County*, 211 F.3d 79, 88 (4th Cir. 2000); *Town of Amherst v. Omnipoint Communications*, 173 F.3d 9, 14 (1st Cir. 1999).

did not necessarily mean a factual inquiry, whereas the court of appeals conducted "precisely such [a §253(a)] inquiry" here. Br. in Opp. at 10. But Respondent succeeds only in underscoring the conflict. Faced with a district court that had conducted no §253(a) inquiry at all, the court of appeals here did precisely the opposite of what the Eleventh Circuit did in *BellSouth*: It disdained remand and decided the §253(a) issue itself *precisely because* it felt "no further factual amplification is necessary." App. 18a-19a. The only plausible explanations for such diametrically opposed results in virtually identical procedural postures are that (1) unlike the court of appeals here, the Eleventh Circuit remanded because of the need for factual development of the §253(a) issue, or (2) the Eleventh Circuit followed the "general rule" of *Singleton v. Wulff*, 428 U.S. 106, 119-20 (1976), that it is inappropriate for an appellate court to "consider an issue not passed upon below," while the court of appeals here did not -- yet another conflict between the decision below and *BellSouth*, as well as with *Singleton* itself. *See* Pet. at 23-24.

3. Likewise misdirected is Respondent's effort to sooth the conflicts with *TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000). With respect to §253(a), Respondent seeks to contrast the supposedly "small" franchise requirements at issue in *Dearborn* with the supposedly "burdensome substance" of those at issue here, and asserts that there are "no facts [here] similar to those in *Dearborn*" (Br. in Opp. at 10-11). But these assertions confirm the conflict: *Dearborn* says facts matter under §253(a), while the court of appeals here said they do not.

With regard to the separate conflict between the decision below and *Dearborn* concerning "fair and reasonable compensation" under §253(c), Respondent ignores that, like the *Dearborn* court, the court below addressed the "separate issue" of whether non-cost based fees are permissible under §253(c) (Br. in Opp. at 12), and stated that they are not. App. 32a-33a & n.19. Respondent

does not, and cannot, dispute that *Dearborn* holds that non-cost-based fees are permissible under §253(c), so the conflict is clear. As this conflict is but one example of a growing split of authority among the courts on this issue that has developed in the nearly six years since the 1996 Act became law, threatening municipal budgets nationwide (Pet. at 26 & nn. 9-12), it is time for the Court to resolve the matter.

4. Respondent largely attempts to sidestep the conflicts between the court of appeals' "no facts needed" approach to §253(a) and the plain-language interpretation of §253(a) not only by the Sixth and Eleventh circuits, but by other authorities as well. Try as it might, Respondent cannot escape that, unlike the court below, the FCC does indeed place on §253(a) complainants the burden of submitting factual evidence that the challenged state or local requirements "actually have [the prohibitory] effect" proscribed by §253(a).[4]

Moreover, since the Petition was filed, additional authority has been rendered that conflicts with the court of appeals' construction of §253(a). On November 15, the Arizona Supreme Court held that, absent facts showing the requisite prohibitory effect on complaining CLECs, state law requirements that CLECs submit data on the fair value of their assets and that the state public utility commission exercise "discretion" in setting CLECs' rates, do not violate

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[4] *Pittencrieff Communications*, 13 FCC Rcd. 1735, 1752 (1997), *pet. for review denied sub nom. CTIA v. FCC*, 168 F.3d 1332 (D.C. Cir. 1999). Contrary to Respondent's assertion (Br. in Opp. at 15-16 n. 10), in both *TCI Cablevision*, 12 FCC Rcd. 21396, 21447-21460 (1997), and *Pittencrieff*, 13 FCC Rcd at 1736 & 38, as here, the "nature of the requirements" at issue (*i.e.*, an ordinance and a state statute, respectively) was before the FCC. What was missing (as here) was any evidence of the *effect* of those requirements on the complaining provider, a defect that the FCC found fatal under §253(a), but that the court here apparently thought irrelevant.

§253(a).[5] This decision, rendered by a state court of last resort and clearly conflicting on an issue of federal statutory law with the court of appeals' "no facts needed" decision here, provides yet another ground for this Court's review. *See* Sup. Ct. Rule 10(a).

II. NEITHER STATE LAW NOR PENDING FCC PROCEEDINGS MILITATE AGAINST CERTIORARI.

At several points, Respondent takes the position that, for various reasons, the court of appeals' rulings with respect to §253 "may well have no real-world effect" on the parties -- essentially that those rulings are dicta. None of Respondents' arguments, however, justifies its curious position.

1. Respondent believes certiorari is not warranted because, due to state law preemption, the court of appeals' decision applies only to Respondent's wireless operations, and even as to those, Respondent speculates that state law may preempt application of the ordinances at issue. Br. in Opp. at 6-8 & 11.

That the court of appeals' §253 rulings may literally apply only to Respondent's wireless operations merely clarifies the issues under review. According to the court of appeals, under § 253(a) facts about whether a complaining carrier provides wireless or wireline service or the "demands" a provider may place on right-of-way, like facts about whether the requirements actually have the effect of prohibiting a provider's ability to provide service, *do not matter*. The only "facts" that matter are whether the complaining carrier provides telecommunications services and whether the requirements challenged apply to the

[5] *US West Communications v. Arizona Corp. Comm'n*, 34 P.3d 351, 2001 WL 1429373, *4-5 (Az. Sup. Ct. Nov. 15, 2001). This decision vacated, on state law grounds, the earlier decision of the Arizona Court of Appeals cited in the Pet. at 12 & 17.

provider. App. 19a. While we share Respondent's apparently newly-found view that other facts should be relevant under §253(a), it is the correctness of the court of appeals' contrary holding that such facts are irrelevant that is clearly and suitably presented for review here.

As for Respondent's suggestion that state law may also preempt the ordinance requirements that the court of appeals did address under §253, Respondent overlooks that one of the reasons the court of appeals addressed the §253 issue is because, under Washington state law, the federal law issue under §253 must be addressed to resolve the state law issue. App. 23a (quoting RCW §35.99.040(2)(c)). Moreover, to the extent that Respondent truly believes that application of the ordinance provisions at issue to its wireless operations is preempted by state law, then Respondent has managed only to identify yet another conflict between the decision below and that of another circuit: *Bell Atlantic v. Prince George's County*, 212 F.3d 863, 865-66 (4th Cir. 2000), where the Fourth Circuit held that it was reversible error under *Ashwander v. TVA*, 297 U.S. 288 (1936), for a court to decide the "constitutional question of preemption [under §253] in advance of considering state law questions upon which the case might have been disposed of...."

2. Respondent's suggestion[6] that it would be premature for the Court to address the §253 issues in light of the FCC's pending *NOI* concerning right-of-way ordinances under §253 is wrong for at least three reasons: (1) the FCC's *NOI*, which was issued over two years ago, is not even a notice of proposed rulemaking, and the FCC is under no obligation to take any action at all on the *NOI*; (2) the whole purpose of §253(d) was to deprive the FCC of any jurisdiction over §253(c) issues, *e.g.*, *BellSouth*, 252 F.3d

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[6] Br. in Opp. at 7 n.2 & 12-13 (citing *Promotion of Competitive Networks*, Notice of Inquiry, 14 FCC Rcd. 12673, 12712-77, ¶¶ 70-80 (1999) ("*NOI*")).

at 1190-91; and (3) as the decision below and a wealth of others make plain (*e.g.*, precedent cited in Pet. at 12-13 n.7), the courts share concurrent jurisdiction with the FCC over §253(a) claims, meaning that any interpretations of §253 by the FCC are not entitled to deference in any event, *see Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

III. THE COURT OF APPEALS ERRED ON IMPORTANT FEDERAL ISSUES.

1. Respondent's attempt (at 13-14) to belittle the significance of the court of appeals' gross misapplication of Fed.R.Civ.P. 12(c) is belied by the opinion and record below. The court of appeals' opinion leaves no doubt that it drew several inherently factual inferences in Respondent's favor, most particularly the "costly and cumbersome" nature of the ordinance requirements at issue (App. 19a). Further, the pleadings on Respondent's counterclaim make equally plain that, in reaching its decision, the court of appeals assumed the truth of Respondent's counterclaim allegations that the ordinances were "burdensome" and "onerous" rather than Petitioners' specific *denial* of these factual allegations. *Compare* Respondent's Counterclaim at ¶ III(7) *with* Petitioners' Reply to Counterclaim at ¶ 12. Far from being a "passing" comment, the court of appeals' improper inversion of the Rule 12(c) standard colored its entire decision. It also represents a seriously and highly prejudicial departure from the usual course of judicial proceedings warranting this Court's exercise of supervisory authority. *See* Sup. Ct. Rule 10(a). Otherwise, not only Petitioners, but all other local governments before courts that are either bound by, or cast under the spell of, the decision below will be denied the fundamental "opportunity to offer all the evidence they believe relevant" in §253 cases. *Singleton*, 428 U.S. at 120 (citation omitted).

2. It is Respondent's, not Petitioners', construction of §253(a) that is "countertextual" (Br in Opp.

at 14). Nothing in §253(a) "preclude[s]" discrimination. Neither the word nor the concept of "discrimination" appears in §253(a).[7] Equally misguided is Respondent's related assertion that whether the ordinances at issue "have the effect of prohibiting" Respondent's ability to provide service is irrelevant because §253(a) refers to "any entity" (Br. in Opp. at 14). Congress' use of the phrase "any entity" in §253(a) no more suggests any intent to allow Respondent to bring the claims of unidentified, hypothetical third parties than does Congress' common use of the phrase "any person" in other statutes setting forth legal prohibitions.[8] But even assuming *arguendo* that §253(a) would allow Respondent to bring such *jus tertii* claims, the fundamental defect in the court of appeals' decision remains: It relieved Respondent of the burden of presenting any evidence that the ordinance requirements at issue had "the effect of prohibiting" either Respondent *or any other unidentified, hypothetical "entity"* from providing service.

3. Respondent's effort to defend the court of appeals' position that "fair and reasonable compensation" under §253(c) is limited to cost reimbursement (Br. in Opp. at 16-17) misses the mark. Respondent's fixation on the

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[7] While the concept of non-discrimination does appear in §253(c), that provision is, as even the court of appeals recognized, a "safe harbor" that comes into play if, and only if, a requirement is found to violate §253(a). App. 27a; *BellSouth*, 252 F.3d at 1187.

[8] *See, e.g.*, 47 U.S.C. § 202(a). In any event, the prerequisites for allowing such *jus tertii* claims are not remotely satisfied here: (1) There are no obstacles to other "entities" such as CLECs bringing their own §253 claims if they believe the ordinances have the requisite prohibitory effect as them; and (2) the relationship between Respondent, an ILEC and a Bell Operating Company, and other "entities" like CLECs is hardly a "special relationship" where Respondent can be trusted to protect CLEC interests, *compare Singleton*, 428 U.S. at 113-118 *with id.* at 124-131 (Powell, J., concurring in part and dissenting in part). To the contrary, Respondent's interests are inherently antagonistic to those of CLECs. *See, e.g., Iowa Utilities Board*, 525 U.S. at 377-78 & 388-390.

word "use" has no effect on the analysis: We doubt, for instance, that the fact that a tenant pays compensation for the "use" of leased premises means a landlord is therefore entitled only to cost reimbursement. To the contrary, Respondent's own precedent makes clear that "[m]arket value fairly determined is the normal measure of [compensation]." *U.S. v. Causby*, 328 U.S. 256, 261 (1946). Respondent's rhetoric that any compensation other than mere cost reimbursement would be "inconsistent with the overarching purpose" of the 1996 Act ignores this Court's teaching that "it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. U.S.*, 480 U.S. 522, 525-26 (1987). *Accord Director, Office of Workers' Compensation v. Newport News Shipbuilding*, 514 U.S. 122, 136 (1995). Here, both the plain meaning of the "compensation" language in §253(c) and its legislative history leave no doubt that Congress did *not* intend local governments' right to rent-based right-of-way compensation to be sacrificed on the altar of the 1996 Act's general procompetitive goals. *See* Pet. at 28-29 & n.13.

For the foregoing reasons and those set forth in the Petition, the Court should grant the petition for writ of certiorari.

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